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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

IN RE STATE OF MISSOURI, ET AL.,
Petitioners,

v.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
AND THE
HONORABLE CHARLES W. BAKER, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI FROM FINAL JUDGMENT ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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I

QUESTIONS PRESENTED

The issue presented herein concerns the question of whether the State of Missouri or the federal Bankruptcy Court for the Eastern District of Arkansas has jurisdiction over grain located in Missouri grain storage warehouses. Robert James, Don James, and G. E. James (the debtors), residents of Arkansas, operated public grain elevators in Missouri and Arkansas under various partnership identities, including elevators located at Holcomb, New Madrid (Rastine), Caruthersville, and Naylor, Missouri. An affiliated corporation, James Agri-Center, Inc., operates a public grain warehouse at Neelyville, Missouri.

On August 11, 1980, these debtors, including the corporation, filed bankruptcy proceedings in the Bankruptcy Court for the Eastern District of Arkansas. Three days prior to the filing of the bankruptcy proceedings, the debtors authorized the Missouri Department of Agriculture to assume control of the grain in their Missouri warehouses, pursuant to Missouri law, empowering the State to operate and liquidate insolvent grain warehouses. The Missouri Department of Agriculture filed receivership petitions for the debtors' grain warehouses, under Missouri law, in the state circuit courts for the counties in which the warehouses are located. On August 12, 1980, subsequent to the filing of the bankruptcy petitions, the Missouri courts appointed John G. Runyan, then director of the Department, as receiver of each warehouse. On August 29 the bankruptcy court entered an order directing the trustee to assume certain grain purchase contracts with the farmers, executed by the debtors prior to bankruptcy. On September 23, 1980, the trustee filed a request in Bankruptcy Court to sell the grain free and clear of all liens. In response to the petition to sell grain, the Missouri authorities brought an action in

Missouri state court against the trustee and debtors for enforcement of the Missouri Grain Laws.

The Missouri officials believed that the legal proceedings brought in state court under the Missouri Grain Laws, as an exercise of the state's police and regulatory power, fell within the exception to the automatic state provision of 11 USC § 362(b)(4). The Bankruptcy Court, the Eastern District of Arkansas, and the Eighth Circuit disagreed with Missouri's position. In its opinion of April 8, 1981, the Eighth Circuit found that the exception to the automatic state provision did not apply to the State of Missouri assuming control of the public grain warehouses in question, and thus the following question is presented to this Court:

1. If appropriate Missouri officials, pursuant to applicable state law, take possession of insolvent public grain warehouses in order to "make an audit and full investigation of the financial circumstances of [debtors] and carry out such operation or liquidation of said public grain warehouse[s] in order to protect the best interest of those individuals storing grain in said facilit[ies]," is such action of a sufficient "police and regulatory" nature to fit within the exception to the automatic state provision of 11 USC § 362(b)(4) so that the Arkansas Bankruptcy Court may not exercise exclusive control over said grain, which grain is, for the most part, not property owned by the debtor?

PARTIES

In the Eighth Circuit Court of Appeals the parties were:

The State of Missouri; John G. Runyan, [then] Director of the Missouri Department of Agriculture; John Ashcroft, Attorney General of the State of Missouri; and, James Boillot, Acting Director of the Missouri Department of Agriculture; all as appellants/petitioners.

The United States Bankruptcy Court for the Eastern District of Arkansas and the Honorable Charles W. Baker, as appellees/respondents; Robert P. Lindsey, Trustee, et al., as intervenor-appellees/intervenor-respondents; and, the United States of America, as intervenor.

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The State of Missouri, et al., petitioners herein, by Attorney General John Ashcroft, State of Missouri, respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on April 8, 1981; no motions for rehearing were filed.

REPORTS OF OPINIONS BELOW

On April 8, 1981, the United States Court of Appeals for the Eighth Circuit issued an Opinion vesting exclusive control of the grain at issue in the Arkansas Bankruptcy

Court. No motions for rehearing were filed. To the best of petitioners' knowledge the Eighth Circuit Opinion has not been published. Reproduction of that Opinion will be found at Appendix A.

On December 2, 1980, the United States District Court for the Eastern District of Arkansas issued an "Opinion and Order" denying the State of Missouri a writ of prohibition and concluding that the grain at issue stored in Missouri was within the exclusive jurisdiction of the Bankruptcy Court. To the best knowledge of petitioners' this "Opinion and Order" has not been published and will be found at Appendix B. It is this "Opinion and Order" which led to the Eighth Circuit Opinion of April 8, 1981, which petitioners' request this Court to review.

JURISDICTIONAL STATEMENT

Title 28 USC § 1254(1) states that cases in the courts of appeals may be reviewed by this Court:

> By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

Title 28 USC § 2101(c) states that:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. . . .

Pursuant to this Court's Rule 20.6 petitioners have requested an additional six days in which to file their petition for writ of certiorari due to the unfamiliarity of the undersigned assistant attorney general with the instant case, and the printer's difficulty in having a printed copy of the petition completed and filed in this Court by July 7,

1981. As of the writing of this petition that motion for an extension of time has not been ruled upon.

Petitioners believe that this case involves a question of substantial federal law relating to the automatic state provision of the bankruptcy code, and exceptions thereto. Thus, petitioners believe that the Eighth Circuit's decision of April 8, 1981, is properly sought to be reviewed by a request of certiorari to that court.

STATUTORY PROVISIONS INVOLVED

Title 11 USC § 362, states, as applicable:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance of employment or process, of the judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

* * *

(3) Any act to obtain possession of property of the estate or of property from the estate;

* * *

(b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—

* * *

(4) Under subsection (a) (1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental units's police or regulatory power[.]

Section 411.519, RSMo 1978, states as follows:

411.519. Insufficient inventory, procedure to correct.—1. Whenever it appears to the satisfaction of the director that a licensed warehouseman does not have in his inventory sufficient grain to cover the outstanding receipts and scale tickets issued or assumed by him, or when the warehouseman refuses to submit his records or property to lawful examination, the director may give notice to the warehouseman to comply with any of the following requirements:

(1) Cover the shortage by supplying the grain or evidence of ownership of the grain;

(2) Give additional bond as required by the director;

(3) Submit to such examination as the director may deem necessary;

(4) Immediately purchase and make actual payment for a sufficient quantity and quality of grain to fully cover the shortage. If the warehouseman fails to comply with the requirements contained in the notice within twenty-four hours from the date of its issuance, or within such further time as the director may allow, the director may petition the circuit court of the county where the warehouse is located, as shown on the license application, for an order authorizing the director or his authorized agent to seize and take possession of any grain located in the warehouse of such warehouseman, and of all pertinent records and property.

2. Upon receipt of the director's verified petition setting forth the circumstances of the warehouseman's failure to comply with this chapter and further stating reasons why immediate possession by the director or his authorized agent is necessary for the protection of depositors, warehouse receipt holders or sureties, the court shall forthwith

issue an order authorizing the director or his authorized agent to take immediate possession for the purposes stated in this section. A copy of the petition and order shall be sent to the warehouseman.

3. At any time within ten days after the director or his authorized agent takes possession, the warehouseman may file with the court a response to the petition of the director stating reasons why the director or his authorized agent should not be allowed to retain possession. The court shall set the matter for hearing on a date not more than fifteen days from the date of the filing of the warehouseman's response. The order placing the director or his authorized agent in possession shall not be stayed nor set aside until such time as the court, after hearing, determines that possession should be restored to the warehouseman.

4. Upon taking possession, the director shall give written notice of his action to the surety on the bond of the warehouseman and may notify the holders of record, as shown by the warehouseman's records, of all receipts and tickets issued for grain to present their receipts or tickets for examination or to account for the same. The director may thereupon cause an audit and other investigation to be made of the affairs of the warehouse to determine the amount of the shortage and compute the shortage as to each depositor as shown by the warehouseman's records, if practicable. The director shall notify the warehouseman and the surety on his bond of the approximate amount of the shortage and may notify each depositor thereby affected by sending notice to the depositor's last known address as shown by the records of the warehouseman.

5. The director or his authorized agent shall retain possession obtained under this section until such time as the warehouseman or the surety on the bond shall have satisfied the claims of all depositors, or until such time as

the director or his authorized agent is ordered by the court to surrender possession. At no time while the director or his authorized agent is in possession of a warehouse, as authorized by this section, shall the director or his authorized agent operate, or be required to operate, the warehouse; nor will the director or his authorized agent be liable for any claims which have arisen or could arise from the non-operation of the warehouse.

6. If at any time, the director, whether or not he or his authorized agent has possession as authorized by this section, has evidence that a warehouseman is insolvent or is unable to satisfy the claims of all depositors, the director may petition the circuit court for the appointment of a receiver to operate or liquidate the business of the warehouseman in accordance with law.

7. All necessary expenses incurred by the director, his authorized agents or any receiver appointed under this section, in carrying out the provisions of this section may be recovered from the warehouseman in a separate civil action brought by the director in the circuit court or as part of the seizure or receivership action filed under this section. If the director or any of his authorized agents seize and take possession of the grain, records or property at the warehouse facility, the warehouseman shall be assessed and shall pay as part of the necessary expenses incurred a fee of fifty dollars per person for each day or part thereof that each such person performs such activities. The cost of liability insurance necessary to protect the director, the receiver and others engaged in carrying out the provisions of this section may be recovered as part of the necessary expenses. (L. 1977 S. B. 75 § 7)

STATEMENT OF THE CASE

This petition is brought as a result of the Eighth Circuit's determination that the exclusion to the automatic

state provision of the bankruptcy code, found at 11 USC § 362(b)(4), is not applicable to the attempt on the part of the State of Missouri to take possession of insolvent public grain warehouses within its jurisdiction, which grain in large part is not owned by the debtors. The Eighth Circuit found that this activity by the State of Missouri was not the type of "police or regulatory power" utilized by a governmental unit so as to except it from the automatic state provision of the Bankruptcy Code. The State of Missouri disagrees and states that its attempt to regulate insolvent public grain houses in the State of Missouri is exactly that type of "police or regulatory power" which is necessary to the health, welfare, and safety of its citizens and that the Eighth Circuit erred in not so concluding.

In this regard, the history of this case is as follows:

Chapters 411 and 276 of the Revised Statutes of Missouri ("Missouri Grain Laws") embody a comprehensive statutory program enacted by the Missouri legislature for the regulation of grain within this State.[1] The first regulatory grain law was enacted in 1889 and the most recent major revisions were adopted in 1965, 1977, and 1980. Chapter 411 comprehensively regulates all grain warehouses, public and private, located in the State of Missouri.

The Missouri grain laws were enacted under the police and regulatory powers of the State to protect the public from potential abuses inherent in the grain warehousing business. Historically, farmers have not had the resources for profitable on-site storage of grain. The tremendous

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[1]Chapter 411 (sections 411.010 to 411.785) contains the "Missouri grain warehouse law"; Chapter 276 (sections 276.401 to 276.561) contains the "grain dealers" section of the "stock yards, grain and produce exchanges" law. Chapter 411 deals primarily with grain storage transactions and the regulation of grain warehouses; Chapter 276 deals primarily with the qualification, licensure, bonding, and regulation of grain dealers.

volume of grain produced annually and the high cost of constructing and operating the facilities required to store grain prevent farmers from maintaining their own storage facilities. Instead, the public grain warehouse business developed and grain farmers have no practicable alternative to storing all of their grain in public warehouses.

The transaction between the farmer and the warehouseman is a bailment. The procedure to store grain is simple and routine: The farmer loads his truck with grain grown on his farm and transports it to the warehouse; at the warehouse, the farmer drives his truck onto a large scale (whose accuracy is regulated by state inspectors) and the weight of the truck, driver, and grain is recorded; the farmer then dumps his grain into a grain pit and immediately proceeds to the scales where the truck and driver are again weighed. A receipt is issued to the farmer for the difference between the recorded weights—the weight of the grain stored. Thus, the farmer delivers his grain to the warehouseman under a contract of bailment. The warehouseman-bailee gives the farmer-bailor a receipt evidencing the farmer's ownership of the grain. Under the contract of bailment, the bailee agrees to redeliver the bailed property to the bailor upon demand and in the same condition in which it was originally received. In return for fees paid by the farmer, it is the bailee's duty to protect the grain and provide whatever treatment is necessary to avoid deterioration so that the grain is redelivered upon demand in the same condition it was received. The bailor has the right to receive grain of the same quality and quantity as that delivered and the bailee-warehouseman is liable for any deficiency in quality or quantity.

Grain is perishable (subject to deterioration primarily by heat, humidity, and rodents) and fungible (one farmer's grain is indistinguishable when mixed with grain stored by other farmers).

Grain is a product of the farmer's labor which he can sell for immediate cash or use as a medium of investment. The purpose of the contract of bailment in lieu of an outright sale of the grain is to allow the farmer to defer selling his grain in anticipation of a rise in grain prices. By placing his grain in storage, the farmer retains ownership of the grain and therefore retains the right to determine *when* the grain is sold. Storing the grain under a contract of bailment also allows the farmer to borrow against the grain. The contract of bailment does not preclude the farmer from using his receipt as collateral. Borrowing funds against the grain allows the farmer to realize immediate cash and also retain ownership for investment purposes. Because the price of grain is usually depressed at the time of harvest, the farmer would often be unable to make any profit if he were unable to retain ownership of the grain until market prices adjust following harvest.

Therefore, because grain storage involves the two volatile economic characteristics of perishability and investment, the State of Missouri has undertaken to regulate every aspect of grain storage transactions.

Under Missouri grain laws, a public grain warehouseman: 1) must be licensed; 2) must be adequately bonded; 3) must provide a detailed monthly accounting of stored grain and receipts; 4) must file annual tariffs of receiving, storage, and delivery charges; 5) must issue only standardized, serialized receipts which are obtainable exclusively through state-authorized printers (every receipt must be accounted for before new receipts can be obtained); 6) must honor receipts upon demand; 7) must not issue receipts not supported by grain actually stored; 8) must redeliver stored grain of identical quality and quantity to the depositer; and, 9) is subject to criminal penalties for violation of the Missouri grain laws.

Prior to August 8, 1980, grain warehouses owned by Robert James, Don James, G. E. James, or entities controlled by them ("The James Brothers" or the "debtors") were licensed by the State of Missouri to operate at five separate locations in Southeast Missouri. As of that date, these warehouses had issued several hundred receipts to farmers who had deposited grain therein.

On August 8, 1980, the James Brothers voluntarily surrendered possession and control of the grain located in their warehouses in Missouri to the Department of Agriculture. The Department took control of each warehouse and immediately conducted an audit which showed that, except for insignificant discrepancies at two warehouses, enough grain was on hand at each of the warehouses to meet the obligations under the outstanding receipts.

On August 11, 1980, the James Brothers filed bankruptcy petitions in the United States Bankruptcy Court for the Eastern District of Arkansas.

On August 12, 1980,[2] in order to insure the proper operation of the warehouses in conformity with the Missouri grain laws, the Department of Agriculture filed separate receivership actions in the respective Missouri circuit courts for the counties where the grain warehouses were located; on that same date, each respective circuit court appointed the Director of the Department of Agriculture as the receiver of the grain located in those warehouses. Upon such appointment, the receiver immediately took possession of the warehouses.

On August 15, 1980, the bankruptcy court appointed

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[2]The petitions in the August 12, 1980, enforcement proceedings were prepared prior to the August 11, 1980, filings in the bankruptcy court. These petitions were filed without knowledge that the debtors had filed bankruptcy the preceding day.

Robert P. Lindsey, a resident of Arkansas, as bankruptcy trustee and authorized him to operate the grain warehouses and engage in a grain warehouse business at four of the warehouses located in Missouri.

On August 27, 1980, the trustee sought and obtained an order of the Bankruptcy Court authorizing him to compel specific performance of certain grain purchase agreements entered into by The James Brothers prior to bankruptcy. Under these contracts, farmers were required to deliver and sell to the trustee as-yet undelivered grain; the Bankruptcy Court also authorized the trustee to resell the grain so purchased. The trustee's admitted purpose was to reap substantial profits from these grain transactions.

The trustee's plan became immediately apparent. The holders of receipts to the grain became incensed upon realizing that the Bankruptcy Court and the trustee intended to compel specific performance of these purchase and sale contracts while, at the same time, they refused to honor valid receipts of stored grain. Some of the holders of receipts were required to sell additional grain to the trustee even though the trustee refused to honor receipts held by them.

On September 23, 1980, the trustee claimed ownership of *all* the grain in a pleading filed in the Bankruptcy Court. This was the first time the trustee had made such a claim and the Missouri authorities became greatly disturbed. In the same pleading the trustee sought approval from the Bankruptcy Court to sell *all* the grain on October 27, 1980. Attempts to sell the grain had been galling to some of the holders of receipts because the sale destroys a farmer's opportunity to realize profit upon sale in the grain market.

On October 20, 1980, the Missouri authorities filed a lawsuit in the Circuit Court of New Madrid County, Missouri, for the purpose of enforcing the Missouri grain laws.

This enforcement proceeding named the bankruptcy trustee and the debtors as defendants and sought the following relief: 1) immediate possession of the Missouri warehouses, including the grain and records contained therein; 2) authorization to protect and preserve the grain and the records; 3) an injunction "pending the final hearing and determination of this proceeding" restraining defendants from interfering with plaintiffs' enforcement of the Missouri grain laws and plaintiffs' prosecution of its enforcement proceedings; 4) a temporary restraining order restraining defendants from interfering with plaintiffs' enforcement of the Missouri grain laws and plaintiffs' prosecution of this enforcement proceeding; 5) an injunction enjoining the bankruptcy trustee from acting as a warehouseman or grain dealer in the State of Missouri without a license; 6) a prompt hearing on the injunctions and restraining order; and, 7) a prompt hearing on plaintiffs' right to possession of the grain. After an ex parte hearing, the Missouri circuit court issued a temporary restraining order.

Immediately upon returning to his office from the October 20, 1980, New Madrid proceedings, James F. Gunn, an attorney of counsel to the Missouri Attorney General in the enforcement proceedings, was advised by telephone by bankruptcy Judge Charles Baker that contempt proceedings would be held in Bankruptcy Court at 9:30 a.m. on the morning of October 22, 1980. Because of this telephone call, the Missouri authorities filed a petition for a writ of prohibition in the Eighth Circuit on October 21, 1980; on that same day, the Eighth Circuit denied the petition without prejudice to the refiling of the petition in the district court in Arkansas by October 30, 1980, and stayed the proceedings in the Bankruptcy Court pending the refiling of that petition.

On October 30, 1980, the Missouri authorities filed (Appendix C) a petition for writ of prohibition in the district court in Arkansas and, on December 2, 1980, District Court Judge Howard denied the writ with respect to prohibiting the bankruptcy judge from interfering with the Missouri enforcement proceeding. (Appendix B).

The Eighth Circuit opinion of April 8, 1981, as referred to previously, culminated from an appeal of the December 2, 1980, order of District Court Judge Howard consolidated with a second writ of prohibition filed by the Missouri authorities in the Eighth Circuit requesting that the bankruptcy proceedings be stayed. As pertinent to this petition the Eighth Circuit concluded that the Arkansas Bankruptcy Court had plenary control of the grain located in Missouri and that the judicial actions of the State of Missouri did not fall within the exception to the automatic state provision of the Bankruptcy Code because:

> Missouri's grain laws, although regulatory in nature, primarily relate to the protection of the pecuniary interest of the debtors' property and not to matters of public safety and health. Missouri's laws, by governing the operation and liquidation of grain and warehouses, directly conflict with the control of the property by the bankruptcy court and, therefore, do not fall within the section 362(b)(4) exception.

THE REASONS FOR GRANTING THE WRIT

Petitioners submit that a writ of certiorari should issue because the Eighth Circuit's decision of April 8, 1981, decides an important question of federal law which has not been, but should be, settled by this Court, and has decided that question in a fashion which suggests that it may be in conflict with previous decisions of this Court.

Based upon the foregoing section petitioners posit that

their effort to act as receivers of the insolvent public grain warehouses of the James Brothers, located in Missouri, were within the exception of the automatic stay provision of the Bankruptcy Code. It is petitioners' position that their action pursuant to § 411.519, RSMo 1978, was for the public health, welfare, and safety of the Missouri citizenry. As noted, the Missouri grain laws strictly control and regulate all aspects thereof. These laws were passed in an effort to protect the farmers of this State, and farmers of other states storing grain in Missouri. These laws were not passed only to protect a portion of the citizenry, i.e. farmers, but were passed to protect the whole of Missouri citizenry against fradulent and disreptuable practices of grain warehousement. It is not only the farmers who need this protection, but all the citizenry of Missouri, so that grain grown in this State, and other states but stored here, is fairly and equitable dealt with and distributed in a manner which provides for the health, welfare, and safety of Missouri citizens, and others.

The foregoing discussions, in this and the previous section, indicate that Missouri's grain laws are "police and regulatory laws" within the meaning of the exception to the automatic bankruptcy stay provision. It has been conceded that the Missouri authorities have no pecuniary interest in the grain; rather, their sole interest in the grain at issue here is to protect Missouri farmers and Missouri citizens so that the farmers can produce and store their grain safety and equitably, and so that this grain can be readily and easily distributed to the people of this and other states. Without such regulations a disruption of some consequence to the grain market for farmers, and food market for consumers, is not beyond the realm of possibility.

Therefore, petitioners posit that the Eighth Circuit's conclusion that the Missouri authorities were exercising

only a pecuniary interest in the grain and not one relating to its "police and regulatory power" is erroneous.

Missouri's interest in this case goes far beyond the mere ambit of the instant grain situation; rather, the State of Missouri is concerned that the Eighth Circuit's very narrow definition of "police and regulatory powers" will prevent the State of Missouri, in the future, in substantially different situations, from adequately and effectively protecting its citizenry any time a petition in bankruptcy is filed. Indeed, the Eighth Circuit's narrow definition may have the following consequences; a city would no longer be able to require a land developer in reorganization to comply with the zoning laws; a state would no longer be able to require a liquor store owner in reorganization to comply with liquor control laws; and, the SEC would no longer be able to require a securities dealer in reorganization to comply with securities registration laws.

This Court has repeatedly held that a state statutory scheme regulating grain, grain transactions, grain dealers, grain warehouses and the grain warehouse industry in general is an exercise of the state's police and regulatory powers. *Munn* v. *Illinois*, 94 U.S. 113 (1876); *Budd* v. *New York*, 143 U.S. 517 (1892); *Brass* v. *North Dakota*, 153 U.S. 391 (1894). In each of these cases this Court upheld the power of state legislators to enact comprehensive regulatory schemes governing the grain industry. This Court in *Munn* specifically found that the grain industry had been "clothed" with the requisite "public interest" in order to render it regulable under a state's police and regulatory power:

> "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which

> the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good. . . .
>
> . . . [W]hen private property is devoted to a public use, it is subject to public regulation.
>
> . . . Certainly, if any business can be 'clothed with a public interest' . . . this has been. . . . [I]t is by the facts.
>
> . . . And it must be conceded that it is a business in which the whole public has a direct and positive interest"

Munn, supra, 94 U.S. at 126-133.

After finding regulation of the grain industry to be within the scope of the police and regulatory power of the state, this Court in *Munn* further held that the state would not be second-guessed with respect to the extent it exercised its police and regulatory power: "Of the propriety of the legislative interference within the scope of legislative power, the legislature is the exclusive judge." *Id.*, 94 U.S. at 132-133.

Enforcement of the Missouri grain laws is an exercise of the police and regulatory powers of the State of Missouri. Although this Court has spoken with respect to the statutory schemes of various states other than Missouri, the Missouri Supreme Court has concluded, citing *Munn* at authority, that the Missouri grain laws were enacted pursuant to the police and regulatory powers of the State of Missouri:

> "[T]he conduct of this business necessarily affected the public and made its regulation a proper exercise of the police power of the state. . . ."

State ex rel. Hubbard v. *Cochrane*, 175 S.W. 599, 601 (Mo. 1915).

The case law is unanimous; there is no authority for the proposition that the Missouri grain laws were not enacted pursuant to the State's police and regulatory powers. Therefore, enforcement of the Missouri grain laws fall squarely within the § 362(b)(4) exception to the Bankruptcy Court's jurisdiction.

Axiomatically, laws against stealing obviously "protect the pecuniary interests and property" of owners of that property, and no one would contend that laws against stealing are not an exercise of the police powers of the state. The decisive point is that neither the State of Missouri, its Department of Agriculture, nor its Attorney General, has any pecuniary interest in the grain or in the enforcement of its grain laws; none of them holds any document or title to any of the grain or derives money of any kind from exercising jurisdiction. To the contrary, enforcement of the Missouri grain laws is an expensive undertaking and such expense only emphasizes that this is an exercise of its police and regulatory powers. The Missouri authorities are obligated by the statutes to enforce the Missouri statutes; they stand to benefit only to the extent that the directives of the Missouri legislature are complied with and that public confidence will continue in the ability of Missouri to enforce its laws.

Enforcement by the State of Missouri pursuant to its police and regulatory laws is a power within the exclusive domain of sate authorities and the state courts. Congress deemed it better to allow the states to enforce their own regulatory laws because the states and their agencies would likely be more expert and knowledgeable and more sensitive to local conditions.

In *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939), this Court expressly held that a Bankruptcy Court had no power to interfer with a debtor railroad's regulatory re-

lationship with the state. This Court found that congress never intended to give Bankruptcy Courts or trustees the power to regulate in the public interest and held that state regulation in the public interest was entrusted exclusively to state administrative agencies. In *Palmer*, proceedings were pending before a Massachusetts state agency charged with the regulation of railroads. In the proceedings, permission was sought to have the bankruptcy trustee abandon the responsibility to service various railroad stations serviced by the railroad prior to bankruptcy. The Bankruptcy Court authorized the abandonment, but this Court reversed the holding stating that the Bankruptcy Court was powerless to enfringe upon responsibilities entrusted exclusively to the state and its agencies. Mr. Justice Frankfurter stated at 208 U.S. at 86:

> "But the [bankruptcy] court claimed power over the carrier's relation to the state. It has become the settled social policy both of the states and the nation to entrust the type of public interest here in question to expert administrative agencies because of 'the notion', as Judge Learned Hand pointed out below 'that a judge is not qualified for such duties.' "

It was argued in *Palmer* that enforcement of state regulatory powers over the railroad and reorganization would impair the ability of the railroad to effectively reorganize. This Court rejected that argument ruling that state law should be followed without regard to its effect upon reorganization.

The *Palmer* Court cautioned that time delays resulting from fully complying with state laws or the financial loses which may result from such compliance may "easily be exaggerated." The Court went on to downplay such complaints when it stated at page 39:

> "Perhaps it is no less true that amenability to state

laws will serve as an incentive to the formulation of reorganization plans. . . ."

The State of Missouri has a duty to protect the public from all form of improper management of grain warehouses, including fraud and abuse by their operators. In order to accomplish this goal of protecting the public, the state enacted comprehensive legislation—the Missouri grain laws—which require licensing of grain dealers and grain warehousemen, and provides for detailed regulation of the grain busines. The Missouri grain laws give the Missouri authorities the right to take possession of warehouses and appoint a receiver to assume their operation in the public interest. Section 411.519, RSMo 1978. Rehabilitation of debtors in bankruptcy does not trigger a moratorium on the enforcement and applicability of police power enactments of the State of Missouri.

This Court and the Missouri Supreme Court have determined that the enforcement of grain laws is a valid exercise of a state's police and regulatory powers. Section 362(b)(4) of the Bankruptcy Code permits enforcements initiated by state regulatory authorities to continue even though a bankruptcy petition has been filed. The case law is overwhelming that Bankruptcy Courts do not have subject matter jurisdiction to enjoin enforcement proceedings initiated by state regulatory authorities. The Arkansas Bankruptcy Court is attempting to enjoin Missouri's enforcement of its grain laws. Nevertheless, bankruptcy is powerless to thwart the Missouri circuit court's exclusive jurisdiction over such enforcement proceedings. The October 20, 1980, lawsuit now pending in the Circuit Court of New Madrid County should continue.

CONCLUSION

The State of Missouri, et al., petitioners herein, respectfully request, based upon all the foregoing, that this Court issue a writ of certiorari to the Eighth Circuit and after briefing and oral argument reverse that court's decision to the extent that it holds Missouri grain laws and their enforcement by Missouri authorities do not fall within the exception to the automatic stay provision of the Bankruptcy Code.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In Re: State of Missouri; State of Missouri Ex Rel John G. Runyan, as Director of the Missouri Department of Agriculture; State of Missouri Ex Rel Missouri Department of Agriculture; John G. Runyan, as Receiver of Certain Grain Warehouses; State of Missouri Ex Rel John Ashcroft, Attorney General of the State of Missouri; and James Boillot, Acting Director of the Missouri Department of Agriculture,

Appellants,

v.

U.S. Bankruptcy Court for the E.D. of Arkansas and the Hon. Charles W. Baker,

Appellees,

and

Robert P. Lindsey, as Trustee, et al.,

Intervenor-Appellees,

and

United States of America,

Intervenor.

No. 80-2179

Appeal from the United States District Court for the Eastern District of Arkansas.

In Re: State of Missouri; State of Missouri Ex Rel John G. Runyan, as Director of the Missouri Department of Agriculture; State of Missouri Ex Rel Missouri Department of Agriculture; John G. Runyan, as Receiver of Certain Grain Warehouses; State of Missouri Ex Rel John Ashcroft, Attorney General of the State of Missouri; and James Boillot, Acting Director of the Missouri Department of Agriculture,

Petitioners,

v.

U.S. Bankruptcy Court for the E.D. of Arkansas and the Hon. Charles W. Baker,

Respondents,

and

Robert P. Lindsey, as Trustee, et al.,

Intervenor-Respondents,

and

United States of America,

Intervenor.

No. 80-2198

On Petition for Writ of Prohibition

Submitted: March 11, 1981

Filed: April 8, 1981

Before BRIGHT, HENLEY, and McMILLIAN, Circuit Judges.

BRIGHT, Circuit Judge.

This case presents the question of whether the State of Missouri or the federal bankruptcy court for the Eastern District of Missouri has jurisdiction over grain located in Missouri grain storage warehouses. The bankruptcy court[1] asserts that it has exclusive jurisdiction over the grain warehouses pursuant to a bankruptcy proceeding instituted by Arkansas debtors, operators of warehouses in Missouri and Arkansas. The State of Missouri[2] asserts that the grain should be liquidated in accordance with provisions of the Missouri Code, under the aegis of the Missouri Department of Agriculture.

The State of Missouri applies here for a writ of prohibition[3] to prevent the bankruptcy court from exercising

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[1]The bankruptcy judge, the Hon. Charles W. Baker, although named as a party, has elected not to appear in these proceedings. Robert P. Lindsey, bankruptcy trustee, has intervened on behalf of the bankruptcy court in support of the court's position. Forty-five farmers who claim an interest in grain stored in Arkansas have also intervened on behalf of the trustee.

[2]The Missouri parties are the State of Missouri; the State of Missouri ex rel. James Boillot, Acting Director of the Missouri Department of Agriculture; John G. Runyan, receiver of certain grain warehouses; and State of Missouri ex rel. Attorney General of the State of Missouri. A group of farmers claiming an interest in grain stored in Missouri has filed an amicus curiae brief on behalf of Missouri.

[3]A writ of prohibition affords an expeditious and effective means of confining an inferior court to a lawful exercise of its prescribed jurisdiction or compelling a court to exercise its authority. *Ex Parte Republic of Peru*, 318 U.S. 578 (1943). In this case, however, the parties delayed consideration of the writ by advising the court of an imminent settlement of the dispute, which the parties failed to achieve.

jurisdiction over the grain. The State also appeals from the district court's[4] denial of its application for a similar writ of prohibition. *See In re Cox Cotton Co.*, 3 C.B.C.2d (Collier's Bankruptcy Cases) 615 (E.D. Ark. 1980).

After carefully reviewing the record and the contentions of the various parties, we sustain the authority of the bankruptcy judge. We hold that the Bankruptcy Reform Act of 1978 (the Code), 11 U.S.C. § 101 *et seq.* (Supp. III 1979), vests the bankruptcy court with exclusive jurisdiction over the grain and grain warehouses in question, subject, of course, to the court's and trustee's obligation to protect the interests of farmers and others who have ownership rights in the grain. *See* 11 U.S.C. § 361. Accordingly, we deny the writ of prohibition and affirm the order of the district court.

I. Background.[5]

Robert James, Don James, and G. E. James (the debtors), residents of Arkansas, operated public grain elevators in Missouri and Arkansas under various partnership identities, including elevators located at Holcomb, New Madrid (Ristine), Caruthersville, and Naylor, Missouri. An affiliated corporation, James Agri-Center, Inc., operates a public gain warehouse at Neelyville, Missouri.

On August 11, 1980, these debtors, including the corporation, filed bankruptcy proceedings in the bankruptcy court for the Eastern District of Arkansas. The partnership liquidations were originally filed under chapter 7 of the Bankruptcy Code, and subsequently were converted into reorganization proceedings under chapter 11 of the Code.

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[4]The Honorable George Howard, Jr., United States District Judge for the Eastern District of Arkansas.

[5]We note that no adversary factual record has been made in these proceedings. Our determination rests upon the various pleadings, affidavits, and representations in the briefs.

The corporation operates as a debtor in possession under chapter 11 of the Code. The bankruptcy court appointed Robert P. Lindsey initially as the interim trustee on August 15, 1980, and later as permanent trustee for the purpose of operating and liquidating the various partnerships.

Three days prior to the filing of the bankruptcy proceedings, the debtors authorized the Missouri Department of Agriculture to assume control of the grain in their Missouri warehouses, pursuant to Missouri law empowering the State to operate and liquidate insolvent grain warehouses.[6] The Missouri Department of Agriculture filed receivership petitions for the debtors' grain warehouses in the state circuit courts for the counties in which the warehouses are located. On August 12, 1980, subsequent to the filing of the bankruptcy petitions, the Missouri courts appointed John G. Runyan, then Director of the Department, as receiver of each warehouse and ordered him to

> make an audit and full investigation of the financial circumstances of respondents [debtors] and carry out such operation or liquidation of said public grain warehouse[s] in order to protect the best interests of those individuals storing grain in said facilit[ies].

On August 29, the bankruptcy court entered an order directing the trustee to assume certain grain purchase con-

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[6]The applicable laws are the Missouri Grain Warehouse Law, Mo. Rev. Stat. § 411.010 to § 411.765 (1979 & Supp. 1980), and the Stockyards, Grain and Produce Exchange Law, Grain Dealers Section, Mo. Rev. Stat. § 276.401 to § 276.581 (Supp. 1980). Chapter 411 deals primarily with grain storage transactions and the regulation of grain warehouses. The law requires state licensing of anyone who operates a warehouse, Mo. Rev. Stat. § 411.255; authorizes the Director of the Department of Agriculture to act as receiver to operate or liquidate a warehouse with insufficient inventory, Mo. Rev. Stat. § 411.519; and incorporates article 7 of the Uniform Commercial Code, Mo. Rev. Stat. § 411.020. Chapter 276 deals with the qualifications, licensing, bonding, and regulation of grain dealers.

tracts with farmers, executed by the debtors prior to bankruptcy. A number of farmers, believing this action deprived them of their rightful possession of their grain, barricaded the New Madrid (Ristine) grain warehouse. The bankruptcy court ordered United States Marshals to intercede and break the blockade.[7]

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[7]Petitioners recite the following version of these events:

About two weeks after the bankruptcy cases were commenced, the bankruptcy trustee obtained an order dated August 27, 1980 from the bankruptcy court authorizing him to operate the business of the partnership Debtors, which included a right on his part to perform grain purchase agreements that the Debtors had made with the farmers and a further right to re-sell the grain he would so purchase to three purchasers pursuant to certain contracts of purchase and sale, involving large quantities of grain; the trustee's expressed purpose was to reap substantial profits. The trustee's plan, of course, became known to the public, and the farmer-receipt-holders became incensed when, although grain would be leaving the warehouses to enable the trustee to perform these purchase and sale contracts, the farmer-depositors were told that they could not get possession of their grain. Some of the farmer-sellers were even being required to sell additional grain to the trustee who would not release their stored grain to them.

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Because of the intolerable situation created by their inability to get possession of their own property, the farmer-depositors either took possession of, or barricaded others from entering, the New Madrid (Ristine) grain warehouse of which the defendant Lindsey was and is trustee. The bankruptcy trustee responded with an application to the bankruptcy court asserting, with inflammatory charges, that these Missouri farmer-depositors were guilty of unlawful possession, criminal trespass and blockade. The bankruptcy court granted an order dated September 15, 1980, effective as of September 11, 1980, ordering that the United States Marshal for the Eastern District of Arkansas and the United States Marshal for the Eastern District of Missouri remove all persons blockading the facilities and directing that the marshals arrest and bring before the bankruptcy court any persons found to be blockading or barricading the facilities or interfering with the trustee's "capacity to operate the debotor's business". United States Marshals appeared at the premises in force, and the farmers reluctantly went home.

On September 3, 1980, the State requested that the bankruptcy court determine the ownership of the grain located in the Missouri partnership warehouses. The State subsequently voluntarily withdrew the request; thus the question of the ownership of the grain remains in dispute. Missouri concedes that the debtors own at least 2.3 percent of the grain. Other parties claiming ownership of the grain include Missouri and Arkansas farmer-producers, the Commodity Credit Corporation, and the First Tennessee Bank, N.A., Memphis. The State and the trustee dispute whether the amount of grain on hand exceeds the outstanding warehouse receipts. The trustee estimates the value of the Missouri grain at approximately $5,000,000.

On September 11, 1980, the bankruptcy court issued an order approving the trustee's application for a grain dealer and warehouse operator's license. The court also fixed the trustee's bond at $1,000,000 and ordered the trustee to comply to the extent possible with Missouri laws and regulations concerning the licensing of grain dealers and warehouses.

The drama escalated when, on September 23, 1980, the trustee filed a request in bankruptcy court to sell the grain free and clear of all liens. The trustee alleged that the grain should be sold because of the cost of storage, the high market price, the danger of deterioration, and the financial benefits of investing the proceedings pending eventual distribution. The trustee asserted authority to sell the grain pursuant to 11 U.S.C. § 363(f)(4), which permits the sale of property owned by an entity other than the bankruptcy estate if the ownership is in bona fide dispute.[8] Here, the trustee alleged a genuine dispute between the estate and other parties concerning ownership of the grain.

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[8]At the same time the trustee filed 14 additional adversary proceedings seeking specific performance of unfulfilled grain contracts in Arkansas and Missouri.

In response to the petition to sell grain, the Missouri authorities brought an action in Missouri state court against the trustee and the debtors for enforcement of the Missouri grain laws. On October 20, 1980, the state court issued a temporary restraining order, coupled with an order to show cause, directing Missouri's Director of Agriculture to take possession of the grain warehouses and restraining the trustee from interfering in any way with the Director's control, operation, and liquidation of the Missouri grain.

Needless to say, the order produced an immediate response from the trustee and the bankruptcy court. On the same day the state order issued, the bankruptcy judge telephoned counsel for Missouri's Director of Agriculture and advised him that contempt proceedings would be heard against the Director.

The Missouri officials immediately sought a writ of prohibition in this court. We denied that petition on October 21, 1980, without prejudice to the filing of a petition for such a writ in the district court for the Eastern District of Arkansas. We also stayed certain bankruptcy proceedings, including the contempt proceeding, pending a further order of this court. The Missouri officials then unsuccessfully sought prohibitory relief in the federal district court. *See In Re Cox Cotton Co.*, 3 C.B.C.2d 615 (E.D. Ark. 1980).

The district court ruled that the bankruptcy court possessed exclusive jurisdiction over the estate of the debtors, which included all legal and equitable interests in property of the debtors wherever located as of the commencement of the action. *See* 11 U.S.C. § 541(a); 28 U.S.C. § 1471(e) (Supp. II 1978). The court also observed that, although state law defines the "interests" in property, federal law controls the issue of whether property, as so defined, becomes property of the debtor's estate. The court recognized that competing claims against the property

existed, and, therefore, the bankruptcy court had jurisdiction at least to determine whether the grain is part of the estate as defined by the Code. *In Re Cox Cotton Co., supra,* 3 C.B.C.2d at 623-24.

Missouri also argued that the legal proceedings brought in state court under the Missouri grain laws, as an exercise of the state's police and regulatory power, fall within the exception to the automatic stay provision of the Code, 11 U.S.C. § 362(b)(4).[9]

The district court rejected this contention, concluding that:

> It is plain Petitioners are not endeavoring to prevent a violation of consumer protection, environmental protection, fraud or a similar police or regulatory law involving the safety, health, morals and the general welfare of society, but on the contrary, Petitioners' sole objective is to protect the pecuniary interests in

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[9]Section 362, as applicable, provides:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of–
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> (1) the commencement or continuation, including the issuance of employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
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> • • • •
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> (3) any act to obtain possession of property of the estate or of property from the estate;
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> • • • •
>
> (b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay–
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> • • • •
>
> (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power[.]

property of purported depositors. Consequently, Petitioners' action does not fall within the exception to the jurisdiction of the Bankruptcy Court where a governmental unit is enforcing a police or regulatory power. [*In Re Cox Cotton Co., supra,* 3 C.B.C.2d at 624.][10]

The State of Missouri appeals from the district court order and renews its mtoion for a writ of prohibition in this court, contending that

1) the bankruptcy court has no subject matter jurisdiction over the grain located in the debtors' grain warehouses because under Missouri law that grain was not the property of the warehouse owners;

2) the bankruptcy petitions did not automatically stay the Missouri state court proceedings because those proceedings related to governmental enforcement of its police or regulatory power; and

3) the bankruptcy trustee, under federal law, must comply with Missouri grain laws and, therefore, the bankruptcy court has acted beyond its jurisdiction in authorizing the trustee to perform certain functions without a Missouri license.

We affirm the district court and deny the petition for a writ of prohibition.[11]

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[10]The district court also found that to the extent Missouri's Warehouse Grain Act is inconsistent with the provision of the Bankruptcy Code, the law is invalid under the supremacy clause. *See Perez* v. *Campbell,* 402 U.S. 637 (1971).

[11]We also note that during the pendency of this appeal, certain farmers removed approximately 31,000 bushels of soybeans from the Ristine elevator. This grain has now been redeposited in the Missouri Farmers Association, Inc., storage facility at Bernie, Missouri.

II. Discussion.

A. *Jurisdiction.*

As of the commencement of the bankruptcy actions on August 11, 1980, the bankruptcy court acquired "exclusive jurisdiction of all the property, wherever located, of the debtor[.]" 28 U.S.C. § 1471(e). Section 541 of the Code, 11 U.S.C. § 541, establishes that the filing of the bankruptcy petitions creates an estate and defines which property comprises the estate. As explained in the historical and advisory notes to 11 U.S.C. § 541,

> [u]nder paragraph (1) of subsection (a), the estate is comprised of all legal or equitable interest of the debtor in property, wherever located, as of the commencement of the case. * * * *The debtor's interest in property also includes "title" to property, which is an interest, just as are a possessory interest, or leasehold interest, for example.* [H.R. Rep. No. 595, 95th Cong., 1st Sess. 367 (1977), *reprinted in* [1978] U.S. Code Cong. & Ad. News 5963, 6323; S. Rep. No. 989, 95th Cong., 2d Sess. 82, *reprinted in* [1978] U.S. Code Cong. & Ad. News 5787, 5868 (emphasis added).]

To determine whether the bankruptcy court has jurisdiction over the Missouri grain, therefore, we must decide if the debtors' interest in the Missouri grain falls within section 541's broad definition of property.

The trustee relies on the debtors' possessory interest as of the commencement of the action to argue that the Missouri grain constitutes property of the estate. The trustee also asserts that the estate holds a lien against the grain for ongoing storage charges and owns outright some of the grain, claiming that commercial documents indicate a sale to the debtors, rather than a bailment between the farmers and the warehouses. The trustee, however, has

presented no documents of title to substantiate his claim of ownership. Before the district court, the State conceded that the debtors own 2.3 percent of the grain in dispute.

On the record before us, the debtors' interest in the Missouri grain consists of possession[12] and a minute ownership interest. In light of the broad definition of property under section 541 of the Code, these interests in the grain are sufficient to trigger preliminary jurisdiction over the property in the bankruptcy court. 4 *Collier on Bankruptcy* ¶ 541.08[2] (15th ed. 1979); *see In re Farmers Grain Exchange, Inc.*, 1 Bankr. Ct. Dec. 1621 (W.D. Wis. 1975). Of course, the bankruptcy court must make the final determination of property interests after full presentation of the evidence.

Although we hold that the bankruptcy court has preliminary jurisdiction over the property, we emphasize that the bankruptcy court must administer the debtors' limited interest consistent with the ownership rights of holders of documents of title under Missouri law or, in the case of Arkansas grain, under Arkansas law.[13] *See In re Clemens*, 472 F.2d 939, 942 (6th Cir. 1972); *In re Universal Medical Services, Inc.*, 460 F.2d 524, 526 (3d Cir. 1972); *In re Farmers Grain Exchange, Inc., supra*, 1 Bankr. Ct. Dec. at 1622.

B. *Automatic Stay of State Court Proceedings.*

We next examine Missouri's contention that a writ of prohibition should issue based on the "police or regulatory

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[12]Since the debtors filed bankruptcy petitions prior to any state court order interfering with the debtors' right to possession, the debtors, rather than Missouri as receiver, had a possessory interest in the grain as of the commencement of the proceedings in bankruptcy.

[13]As explained by the Attorney General of Missouri, Missouri law provides that fungible goods, such as grain, once commingled, are deemed owned in common by all those entitled to a portion of the goods, which would include holders of warehouse receipts. *See* Mo. Rev. Stat. §§ 400.7-207 and 400.403 (1965).

power" exception to the automatic stay provision of the Bankruptcy Code. Section 362 provides that upon the filing of a bankruptcy petition, all judicial and other proceedings are stayed. This section also lists certain exceptions to the automatic stay, including section 362(b)(4), which provides:

> (b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—
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> * * * *
>
> (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power[.]

Missouri asserts that this exception applies to the enforcement of its grain regulatory laws, and, therefore (1) the automatic stay provisions do not bar the Missouri state court proceedings; and (2) the bankruptcy court lacks the power to prevent Missouri from enforcing its grain laws by taking possession of the debtors' Missouri warehouses. Missouri essentially argues:

> [T]he enforcement of grain laws is a valid exercise of a state's police and regulatory powers. Section 362(b)(4) of the Bankruptcy Code permits enforcement proceedings initiated by state regulatory authorities to continue even though a bankruptcy petition has been filed. The case law is overwhelming that bankruptcy courts do not have *subject matter jurisdiction* to enjoin enforcement proceedings initiated by state regulatory authorities. The Bankruptcy Court here is attempting to enjoin Missouri's enforcement of its grain laws. The Bankruptcy Court is powerless to thwart the Circuit Court's exclusive jurisdiction over such enforcement proceedings. The October 20, 1980

lawsuit now pending in the Circuit Court of New Madrid County should continue. [Appellant's Brief at 32.]

We reject these contentions.

The present stay provisions amplify and clarify provisions of the former bankruptcy law and bankruptcy rules providing for an automatic stay of certain proceedings against debtors. *See, e.g.*, 11 U.S.C. § 148 (repealed 1978); 11 U.S.C. § 428 (repealed 1978); Rules of Bankruptcy Procedure 401, 601, 10-601, 11-44, 12-43 and 13-401. These automatic stays did not apply generally to proceedings affecting the public health and safety or certain governmental regulatory activity. *See In re Shippers Interstate Service, Inc.*, 618 F.2d 9 (7th Cir. 1980) (labor laws); *In re Bel Air Chateau Hospital, Inc.*, 611 F.2d 1248 (9th Cir. 1979) (labor laws); *In re National Hospital and Institutional Builders Co.*, No. 80 Civ. 6073 (S.D.N.Y. Feb. 25, 1981) (zoning laws); *In re Grand Spaulding Dodge, Inc.*, No. 79-C-1416 (N.D. Ill. June 9, 1980) (consumer protection laws); *In re Canarico Quarries, Inc.*, 466 F. Supp. 1333 (D. Puerto Rico 1979) (environmental protection laws); *In re Colonial Tavern, Inc.*, 420 F. Supp. 44 (D. Mass. 1976) (liquor laws).

In explaining the section 362(b)(4) exception, the Congressional House Report comments:

> Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit

> the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors. [H.R. Rep. No. 595, 95th Cong., 1st Sess. 343 (1977), *reprinted in* [1978] U.S. Code Cong. & Ad. News 5963, 6299.]

Additionally, Congressman Don Edwards, Chairman of a subcommittee of the Judiciary Committee considering the Bankruptcy Code, observed:

> This section [362(b)(4)] is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate. [124 Cong. Record H 11089, *reprinted in* [1978] U.S. Code Cong. & Ad. News 6436, 6444-6445.]

In light of the legislative history and court decisions under the earlier bankruptcy act, we believe that the term "police or regulatory power" refers to the enforcement of state laws affecting health, welfare, morals, and safety, but not regulatory laws that directly conflict with the control of the *res* or property by the bankruptcy court. The pertinent provision of Missouri law relied on by the State, which concerns insolvency of grain warehouses, provides:

> If at any time, the director, whether or not he or his authorized agent has possession as authorized by this section, has evidence that a warehouseman is insolvent or is unable to satisfy the claims of all depositors, the director may petition the circuit court for the

> appointment of a receiver *to operate or liquidate* the business of the warehouseman in accordance with law. [Mo.Rev.Stat. § 411.519.6 (1979) (emphasis added).]

We conclude that Missouri's grain laws, although regulatory in nature, primarily relate to the protection of the pecuniary interest in the debtors' property and not to matters of public safety and health. Missouri's laws, by governing the operation and liquidation of grain warehouses, directly conflict with the control of the property by the bankruptcy court and, therefore, do not fall within the section 362(b)(4) exception.

Alternatively, even if Missouri's liquidation proceedings come within the exception, the State's attempted enforcement of its insolvency laws does not oust the bankruptcy court of jurisdiction.

It is well settled that a bankruptcy action preempts state insolvency proceedings. "The bankruptcy law is paramount, and the jurisdiction of the Federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive." *In re Watts and Sachs*, 190 U.S. 1, 27 (1903). *Accord, Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U.S. 734, 737-38 (1931). The bankruptcy court could take appropriate steps to protect its jurisdiction over the estate, regardless of whether a proceeding falls within the section 362(b)(4) exception. For example, the court may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[14] 11 U.S.C. § 105(a).

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[14]According to the historical and revision notes to section 363(b),

> [t]he effect of an exception is not to make the action immune from injunction.
>
> The court has ample other powers to stay actions not cov-

(Continued on next page)

Thus, even if the automatic stay provisions did not apply to the Missouri proceedings, the bankruptcy court possesses power in its discretion to enjoin state courts,[15] officials, and agencies from interfering with assets in custody of the bankruptcy court. *See In re Shippers Interstate Service, Inc., supra,* 618 F.2d at 13; *In re Bel Air Chateau Hospital, Inc., supra,* 611 F.2d at 1251; *In re W. F. Hurley, Inc.,* 553 F.2d 1096, 1101 (8th Cir. 1977); *In re Saugus General Hospital, Inc.,* 19 C.B.C. 651 (D. Mass. 1978) (bankruptcy court may enjoin action by state regulatory agency even when the state action is not automatically stayed by section 362(b)(4); 2 *Collier on Bankruptcy* ¶ 105.02 (15th ed. 1979). In other words, the exception of 11 U.S.C. § 362(b)(4), even if applicable in this case, in no way deprives the bankruptcy court of jurisdiction over assets of the bankrupt's estate, and therefore, section 362(b)(4) cannot serve as a basis for issuing a writ of prohibition.

Footnote continued

ered by the automatic stay. Section 105, of proposed title 11 * * * grants the power to issue orders necessary or appropriate to carry out the provisions of title 11. The bankruptcy courts are brought within the scope of the All Writs Statute, 28 U.S.C. § 1651 (1970), and are given the powers of a court of law, equity, and admiralty * * *. Stays or injunctions issued under these other sections will not be automatic upon the commencement of the case, but will be granted or issued under the usual rules for the issuance of injunctions. By excepting an act or action from the automatic stay, the bill simply requires that the trustee move the court into action, rather than requiring the stayed party to request relief from the stay. [H.R. Rep. 595, 95th Cong., 1st Sess. 342 (1977) *reprinted in* [1978] U.S. Code & Cong. News 5963, 6298; S. Rep. No. 989, 95th Cong., 2d Sess. 51, *reprinted in* [1978] U.S. Code & Cong. News 5787, 5837.]

[15] This section [§ 105] is also an authorization, as required under 28 U.S.C. 2283, for a court of the United States to stay the action of a State court. As such, *Toucey* v. *New York Life Insurance Company,* 314 U.S. 118 (1941), is overruled. [H.R. Rep. 595, 95th Cong., 1st Sess. 317 (1977), *reprinted in* [1978] U.S. Code & Cong. News 5963, 6274.]

C. *Licensing.*

Missouri contends that the trustee intends to operate the Missouri grain warehouses without a state license,[16] in violation of 28 U.S.C. § 959 (b)(Supp. II 1978), which provides:

> (b) * * * [A] trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

We need not, however, decide this issue in the present proceeding. Inasmuch as we hold that the bankruptcy court possesses jurisdiction over the grain and the grain warehouses in Missouri, any complaint by Missouri regarding licensing may be presented to the bankruptcy court. Because this particular challenge does not in any way question the bankruptcy court's jurisdiction, it provides no basis for issuing a writ of prohibition.[17]

In addition, we note that the bankruptcy court has recognized that the trustee should operate the warehouse in accordance with state law. In its order granting the interim trustee's application for approval of a grain dealer and warehouse operator's license, the court found that

> there are certain statutory provisions and regulations

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[16]The trustee asserts that he has been unsuccessful in obtaining a license due to uncooperative state officials. The trustee, of course, may complain to the appropriate forum—the bankruptcy court or state court—concerning any improper refusal to issue a license.

[17]The State's complaint concerning the inadequacy of the trustee's bond should likewise be presented to the bankruptcy court.

> in existence in the States of Missouri and Arkansas with respect to the lawful operation and licensing of grain warehouses and grain dealers. That the debtor entities have grain warehouses in both states which prior to bankruptcy were regulated by the States of Arkansas and Missouri. The Court further finds that the Interim Trustee should, to the extent possible, comply with said laws and regulations of the States of Arkansas and Missouri dealing with the licensing and regulating of grain warehouses and grain dealers. That applicant, Robert P. Lindsey, Interim Trustee for the above Debtors, is hereby authorized, instructed, and ordered to comply, to the extent possible, with the above State laws and regulations and to acquire whatever licenses or other written authority is required by the regulatory authorities of Arkansas and Missouri as above set forth.

Clearly, by requiring the trustee to obtain state licenses to operate the warehouses, the bankruptcy court has recognized that the trustee must act consistent with the dictates of 28 U.S.C. § 959(b).[18]

III. Pending Motions.

The trustee has asked this court to require the State to post a bond in favor of the bankruptcy court. We deny that motion.

The trustee also has requested this court to authorize him to sell 31,000 bushels of soybeans now located in the MFA elevator at Bernie, Missouri. We also deny this motion and comment thereon.

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[18]We add that any authorized action by the trustee to liquidate or sell the grain appears to fall within the power of the bankruptcy court to liquidate the debtors' assets under the Bankruptcy Act. We doubt, therefore, that a trustee must obtain a state license solely for liquidation.

Assuming, without deciding, that this court possesses the power to grant such a motion under the Code, we conclude that the trustee has not set forth sufficient facts to justify the sale. The Bankruptcy Code provides that the trustee, after notice and hearing, may sell "property of the estate," other than in the ordinary course of business. 11 U.S.C. § 363(b). Although the grain here in question is "property of the estate" for jurisdictional purposes, its actual ownership has yet to be determined.

The bankruptcy court may authorize the sale of property

> free and clear of any interest in such property of an entity other than the estate, only if—
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of such interest;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. [11 U.S.C. § 463(f).]

The trustee has established none of these alternative prerequisites.

We note that a motion to authorize the sale of the Missouri grain is presently pending in the bankruptcy court. In determining whether such a sale should be allowed, that court should carefully consider the requirements of section

363(f) and the duty under the Code to protect the property interests of third parties. The Code provisions make clear that when persons other than the debtor have an interest in the property, adequate protection must be taken "as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property." 11 U.S.C. § 361. The bankruptcy court should particularly examine its authority to order the sale if title documents indicate that the estate possesses no substantial ownership rights to the grain and that any bona fide dispute over the property exists only between third parties.

We leave the resolution of these issues, including the sale of the grain stored at Bernie, Missouri, to the bankruptcy court.

IV. **Conclusions.**

We deny the application for writ of prohibition and affirm the order of the district court dismissing the application for a writ of prohibition.

We also add a few comments in our supervisory role over bankruptcy courts in this circuit. The district court noted Missouri's good faith in its efforts to defeat the jurisdiction of the bankruptcy court. We agree, but observe that Missouri officials should have presented the issues raised in the proceeding to the bankruptcy court in the first instance. If dissatisfied with the result, an appeal could have been taken.

We offer the following suggestions to the bankruptcy court:

1) In light of our disposition of the case and the opinion of the district court and this court that the Missouri authorities have proceeded in good faith, the bankruptcy court should consider dismissal of the contempt proceedings.

2) To adequately protect holders of warehouse receipts, particularly Missouri farmers, the bankruptcy court and the trustee may wish to consider the advice of James Boillot, Acting Director of Agriculture for the State of Missouri, either as a party or a proxy or as amicus curiae.

3) The trustee and the bankruptcy court should take steps to expedite the determination of ownership of the Missouri grain, including possible appointment of special masters. *See* Rules of Bankruptcy Procedure 513.

We have by separate order this date dismissed and discharged any and all stays of proceedings in this action.

Writ denied in No. 80-2198; appeal affirmed in No. 80-2179.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

IN RE: STATE OF MISSOURI; STATE OF MISSOURI EX REL JOHN G. RUNYAN, AS DIRECTOR OF THE MISSOURI DEPARTMENT OF AGRICULTURE; STATE OF MISSOURI EX REL MISSOURI DEPARTMENT OF AGRICULTURE; JOHN G. RUNYAN, AS RECEIVER OF CERTAIN GRAIN WAREHOUSES; AND STATE OF MISSOURI EX REL JOHN ASHCROFT, ATTORNEY GENERAL OF THE STATE OF MISSOURI, *Petitioners*	**NO. J-C-80-244**

OPINION AND ORDER

This proceeding is upon a Petition for Writ of Prohibition by the State of Missouri; State of Missouri Ex Rel John G. Runyan, as Director of the Missouri Department of Agriculture; State of Missouri Ex Rel Missouri Department of Agriculture; John G. Runyan, as Receiver of certain grain warehouses; and State of Missouri Ex Rel John Ashcroft, Attorney General of the State of Missouri (hereafter referred to as Petitioners), to be directed to the Bankruptcy Court for the Eastern District of Arkansas, Jonesboro Division, and the Honorable Charles Baker, Bankruptcy Judge.

The central issue is whether the Bankruptcy Court has jurisdiction of grain stored in public warehouses owned by Robert W. James and George E. James, Jr., during business in various partnerships as: Cox Cotton Company, James Grain and Cotton Company, Frisbee Cotton Company, James Grain and Elevator Company and James Gin and Elevator Company (hereafter referred to as debtors), pursuant to a Chapter XI proceeding instituted by debtors under the Bankruptcy Reform Act of 1978, where petitioners claim the right to possession of the grain, under the police and regulatory power of the State of Missouri, in the interest of purported depositors and holders of warehouse receipts.[1]

Another related issue is whether the Bankruptcy Court should be precluded from proceeding with contempt proceedings against petitioners for the alleged violation of orders of the Bankruptcy Court.

Because of the interest this proceeding has generated, the Court deems it advisable to narrate the relevant events culminating in this proceeding.[2]

On August 8, 1980, the debtors executed the following instrument:

"TO: Director, Missouri Department of Agriculture
and
Director's Designated Representative in the en-

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[1]The Court permitted Robert P. Lindsey, Trustee of debtors' estate, hereafter referred to as Trustee, to intervene as respondent since the Trustee filed pleadings in opposition to the Petition for Writ of Prohibition and claims the grain as an asset of the estate.

The Court also permitted forty-five (45) Arkansas farmers to intervene as respondents inasmuch as they claim a substantial portion of the grain and participated, without objection, in the oral argument afforded petitioners.

[2]The Court has received amici curiae briefs from the Attorneys General of Texas and Iowa.

forcement of the Missouri Grain Warehouse Law, Chapter 411, RSMo.

Due to circumstances which have adversely affected the financial position of our businesses licensed with the Missouri Department of Agriculture in accordance with the Missouri Grain Warehouse Law, Chapter 411, RSMo, we hereby grant authority to the Missouri Department of Agriculture to take control of all grain contained in the following facilities:

Missouri License No.	USGA No.	Licensed Legal Entity	Location of Facilities
P-UR-98	8-8650	Donald R., Robert W., and George James d/b/a Frisbee Cotton Company	Holcomb, MO
P-UR-431	8-8598	Donald R., Robert W., and George James d/b/a Frisbee Cotton Company	New Madrid, MO (Ristine)
P-UR-430	8-8600	Donald R., Robert W., and George James d/b/a Frisbee Cotton Company	Caruthersville, MO
P-UR-108	8-8573	Donald R. James, Robert W. James, and George E. James d/b/a James Gin & Elevator Company	Naylor, MO

This authority is granted for the purpose of insuring that all grain is fairly and equitable disbursed, either in full or in pro-rata to the rightful owner(s) and/or depositor(s) thereof. . . ."[3]

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[3]Section 411.519(1)(2) and (6) of Title 26 of Missouri's Grain Warehouse Law provides:

"1. Whenever it appears to the satisfaction of the director that licensed warehouseman does not have in his inventory sufficient grain to cover the outstanding receipts and scale tickets issued or assumed by him, or when the warehouseman refuses to submit his records or property to lawful examination, the director may give notice to the warehouseman to comply with any of the following requirements:

"(1) Cover the shortage by supplying the grain or evidence of ownership of the grain;

"(2) Give additional bond as required by the director;

(Continued on next page)

On August 11, 1980, debtors filed voluntary petitions in the United States Bankruptcy Court for the Eastern District of Arkansas, Jonesboro Division, for liquidation, pursuant to Chapter VII of the Bankruptcy Code.[4]

The Director of the Missouri Department of Agriculture, John G. Runyan, on August 12, 1980, petitioned the Circuit Courts of New Madrid, Dunklin, Pemiscot, Ripley and Butler Counties, Missouri—the locations of four of debtors' warehouses—for appointment as receiver of the warehouses.

The orders of the Missouri Circuit Courts, in addition to appointing the Director receiver, authorized the Director to conduct an audit of the financial affairs of the debtors and carry out such operational liquidation of grain warehouses in a manner that would promote and protect the interest of the depositors of grain.

Footnote continued

"(3) Submit to such examination as the director may deem necessary;

. . .

"2. Upon receipt of the director's verified petition setting forth the circumstances of the warehouseman's failure to comply with this chapter and further stating reasons why immediate possession by the director or his authorized agent is necessary for the protection of depositors, warehouse receipt holders or sureties, the court shall forthwith issue an order authorizing the director or his authorized agent to take immediate possession. . . .

. . .

"6. If at any time, the director, whether or not he or his authorized agent has possession as authorized by this section, has evidence that a warehouseman is insolvent or is unable to satisfy the claims of all depositors, the director may petition the circuit court for the appointment of a receiver to operate or liquidate the business of the warehouseman in accordance with law."

The value of the grain has been estimated as in excess of $5,000,000.

[4]A voluntary petition for reorganization under Chapter XI of the Bankruptcy Code was also filed by James-Agri Center, Inc. on the same day. James-Agri Center, Inc. is a debtor in possession under the Bankruptcy Code.

Robert P. Lindsey was appointed Interim Trustee by the Bankruptcy Court, on August 15, 1980, for the purpose of operating the businesses of the debtors. On August 29, 1980, the Bankruptcy Court entered its order authorizing the Trustee to assume certain executory contracts of the debtors, as modified, with the three grain producers.

On September 3, 1980, Petitioners filed in the Bankruptcy Court an "Application for Determination of Ownership of Customer-owned Assets [the grain in question], for Liquidation . . . and Distribution of the Proceeds." However, on September 22, 1980, the date the Bankruptcy Court scheduled a hearing on Petitioners' application, Petitioners voluntarily served notice of dismissal of their request for determination of ownership of the grain.

On September 11, 1980, the Bankruptcy Court entered an order approving the Interim Trustee's Application for Approval of Grain Dealer and Warehouse Operator's Licenses and Establishing Trustee's Bond at $1,000,000; and further directing the Trustee to "comply, to the extent possible," with the laws and regulations of Missouri dealing with the licensing of grain warehouses and grain dealers. The Bankruptcy Court also found that the bond would satisfy the requirements of the States of Missouri and Arkansas regarding the bonding of grain dealers and warehouses "and will be consistent with the Bankruptcy Code and will adequately protect all creditors of the above entities."

The Bankruptcy Court further ordered Petitioners to remove immediately:

> ". . . any locks, chains, or other security devises at or upon any grain elevators or facilities owned and operated by the above captioned debtor entities so that applicant may take possession of said warehouses and facilities, receive grain, and operate the businesses of

the debtors consistent with previous orders of this Court."

The Bankruptcy Court on September 15, 1980, found, after conducting a hearing, that a substantial quantity of grain was stored in each of debtors' warehouses in need of preservation and protection from loss, destruction and damage; and that certain persons, farmers-producers, had seized and taken possession of the warehouses for the purpose of preventing the Trustee from fulfilling "certain milo contracts with farmers in Arkansas and Missouri and grain purchasers." The Bankruptcy Court further ordered, effective, however, September 11, 1980, United States Marshals for the Eastern District of Arkansas and the Eastern District of Missouri to:

> "... remove and take physical custody and possession of any equipment, personal property, or persons found to be blockading, obstructing, or in any way interfering with the facilities of the debtor entities without the expressed written permission of Trustee, Robert P. Lindsey; that the U.S. Marshals for the above districts be and they further are hereby ORDERED and DIRECTED to assist Trustee in his request to remove any person or property found to be blocking access or entrances to any of the debtor's premises wherever located; and the United States Marshals for each of the above districts be and they are hereby ORDERED and DIRECTED further to arrest and bring before this Court any person found to be blockading, barricading, or in any other manner interfering with Trustee's capacity to operate the debtor's business in each of the above captioned proceedings; and, any such person or persons shall be brought by the United States Marshals for the above districts before this Court at Little Rock, Arkansas, to show cause, if any they have, why they should not be held in contempt of this Court ..."

On September 17, 1980, Petitioners relinquished possession of the warehouses to the United States Marshals and the Trustee.

On September 22, 1980, debtors converted their Chapter VII liquidation proceedings to reorganization under Chapter XI of the Bankruptcy Code.[5]

On September 23, 1980, the Trustee filed an adversary proceeding in the Bankruptcy Court for leave to sell all grain free and clear of any lien. A hearing was scheduled by the Court for October 27, 1980. The Trustee also filed fourteen additional adversary proceedings seeking specific performance of grain contracts against producers in Arkansas and Missouri.

The following order was issued by the Circuit Court of New Madrid County, Missouri, on October 20, 1980, at the request of Petitioners:

> "ORDERED, that, pursuant to Chapter 411, RSMo, as amended, the Director and his authorized agents are hereby directed to take possession of and seize, by physical means, if required, the five Grain Warehouses as described in the plaintiffs' Petition herein and the grain and records contained therein; and it is further
>
> . . .
>
> "ORDERED, that the plaintiffs' motion for a temporary restraining order is granted in all respects by this order; and it is further
>
> "ORDERED, that the defendants[6] show cause be-

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[5]Subsection (a) of 11 U.S.C. § 706 gives a debtor one absolute right to conversion of a liquidation proceeding to a reorganization case under Chapter XI of the Bankruptcy Code. (*see*: H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 380.)

[6]Defendants in the Missouri Circuit Court proceeding are Robert P. Lindsey, Trustee, debtors in the Bankruptcy proceedings and James Agri-Center, Inc., as Debtor in possession in Bankruptcy Case No. J-80-155-B.

fore this Court at the courthouse in New Madrid County, Missouri on November 6, 1980, at 10:30 A.M., or as soon thereafter as counsel can be heard (the 'Hearing Date'), WHY an order should not be made herein enjoining and restraining the defendants and each of them, . . .

"(b) commencing or further prosecuting any proceedings in any court other than this Court, whether or not now pending, involving any or all of the subject matter of this proceeding;

"(c) taking any action or steps in defendant Lindsey's adversary proceeding pending in the bankruptcy court in Arkansas under Nos. J-80-154-B and J-80-155-B as against any of the several hundred individual defendants therein who are depositors of grain or holders of receipts issued by any of the five Missouri Grain Warehouses, and from noting any purported default by any of such defendants therein or from otherwise affecting their ownership of or rights in such grain in any manner;

"(d) moving, transferring or removing any of the grain now contained in any of the five Missouri Grain Warehouses referred to in the Petition herein;"

On October 22, 1980, the Trustee petitioned the Bankruptcy Court for contempt citation, temporary restraining order, preliminary injunction and permanent injunction against Petitioners for the purported violation of the prior order of the Bankruptcy Court; and enjoining them from interfering with the Trustee in the operations of the debtors' businesses. A hearing was scheduled for October 22, 1980, at 9:00 a.m., at the United States Post Office and Courthouse Building, Little Rock, Arkansas.

The following order was issued by the Court of Appeals for the Eighth Circuit:

"Petition for a Writ of Prohibition filed by the State of Missouri ex rel. John G. Runyan, et al. (Petitioners) and directed to the United States Bankruptcy Court for the Eastern District of Arkansas, Jonesboro Division and Charles W. Baker a Bankruptcy Judge of that Court, having been considered by the Court, is hereby denied without prejudice to the filing of said petition for a Writ of Prohibition in the United States District Court for the Eastern District of Arkansas on or before Thursday, October 30, 1980.

"The Court further directs a stay of all proceedings in cause Nos. J-80-154-B and J-80-155-B now pending before the Bankruptcy Court until the Writ of Prohibition has been presented to and ruled upon by the United States District Court for the Eastern District of Arkansas."[7]

The thrust of Petitioners' argument for writ of prohibition may be summarized: the Bankruptcy Court does not have subject matter jurisdiction since a substantial portion of the grain in debtors' warehouses is not owned by them. Consequently, the grain is not an asset of the estate and the Bankruptcy Court did not acquire jurisdiction under any provision of the Bankruptcy Code. Petitioners concede that debtors own 2.3% of the grain.

Moreover, Petitioners contend that the State of Missouri has elected to invoke its police and regulatory powers in order to exercise its right to exclusive possession of the grain for the use and benefit of the depositors-owners. Hence,

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[7]On November 18, 1980, a stipulation between Petitioners and the Trustee, with approval of this Court and the Court of Appeals, was entered of record modifying the Court of Appeals' Stay to the extent that all issues unrelated to the jurisdiction of the Bankruptcy Court to exercise control over the grain, were eliminated from the effects of the Court of Appeals' Stay.

the Bankruptcy Court is powerless to exercise any control over the grain.[8]

JURISDICTION OF THE BANKRUPTCY COURT

Under the Bankruptcy Reform Act of 1978, a debtor's estate is created immediately upon the filing of a petition for relief with the district court clerk. 11 U.S.C. § 541(a). The estate created is composed of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The legislative history of the Bankruptcy Code demonstrates that the scope of Section 541 was intended to be extremely broad. *See*: H.R. Rep. 595, 95th Cong. 1st Sess. 367 (1977).

Title 28 U.S.C. § 1471(e) provides:

> "The bankruptcy court shall have exclusive jurisdiction over all the property of a debtor wherever located of all legal and equitable interests of the debtor in property at the commencement of the case."

While the interest of a debtor in property is determined by State law, the question whether such property is property of the debtor's estate is a federal question to be resolved under the Bankruptcy Code. 4 Collier on Bankruptcy, ¶ 541.02 (15 Ed. 1979); *See*: H.R. Rep. No. 95-989, 95th Cong., 2d Sess. 367-68 (1977); S. Rep. No. 95-989,

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[8]It is clear that the property in question was located on property owned by debtors at the time debtors commenced their Chapter VII proceeding and, consequently, debtors had possession. While debtors sought to deliver possession to Petitioners by executing and delivering a written document to Petitioners, Missouri Grain Warehouse Law does not expressly provide for such a method. Moreover, there is no claim that there is a shortage of grain, or any fradulent conduct on the part of the debtors in any way, but on the contrary the contention is there is a surplus of grain. Except for insolvency of a grain dealer–the basis under Missouri Law for the appointment of a receiver–insufficiency of inventory appears to be the only other statutory ground authorizing the State to assume possession of grain in the interest of depositors.

95th Cong., 2d Sess. 82-84 (1978); 11 U.S.C. § 541; Rule 701 of the Bankruptcy Rules.

The Senate Report, commenting on the broad jurisdiction given Bankruptcy Courts over the debtor and all of his property, including property in dispute, states:

> "... This broad grant of jurisdiction will enable the bankruptcy courts, which are created as adjuncts of the district court for the purpose of exercising the jurisdiction, to dispose of controversies that arise in bankruptcy cases or under the bankruptcy code. Actions that formerly had to be tried in the State court on in the Federal district court, at great cost and delay to the estate, may now be tried in the bankruptcy court. The idea of possession and consent as bases for jurisdiction is eliminated. The adjunct bankruptcy courts will exercise *in personam* jurisdiction as well as *in rem* jurisdiction in order that they may handle everything that arises in a bankruptcy case."

S. Rep. 95-989 to accompany S. 2266, 95th Cong., 2d Sess. 153 (1978); 11 U.S.C. § 105.

Rule 701 which has been characterized as the most important of a number of special rules regulating the disposition of disputes provides:

> "The rules of this Part VII govern any proceeding instituted by a party before a bankruptcy judge to (1) recover money or property, other than a proceeding under Rule 220 or Rule 604, (2) determine the validity, priority, or extent of a lien or other interest in property, (3) sell property free of a lien or other interest for which the holder can be compelled to take a money satisfaction, (4) object to or revoke a discharge, (5) obtain an injunction, (6) obtain relief from a stay as provided in Rule 401 or 601, or (7) determine the dis-

chargeability of a debt. Such a proceeding shall be known as an adversary proceeding."

It seems clear, at the very least, the Bankruptcy Court has jurisdiction to resolve the competing claims to the property in question by scrutinizing the respective legal and equitable interests and decide whether the debtors' interest is such that it is property of the estate within the meaning of Section 541 of the Code.

The Court is persuaded that the Bankruptcy Reform Act of 1978 was designed to empower Bankruptcy Courts to touch all those aspects of a debtor's affairs that bear on his finances. This conclusion is inescapable in light of Title 28 U.S.C. § 1481 which grants Bankruptcy Courts powers of a "court of equity, law and admiralty" and Title 11 U.S.C. § 105 which authorizes the Court to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Code.

Petitioners' effort to interpose the police and regulatory powers of the State of Missouri in order to buttress their claim of exclusive possession over the grain and defeat the jurisdiction of the Bankruptcy Court, while, seemingly, made in the utmost of good faith, must be rejected by this Court for the following reasons:

A. NOT AN EXERCISE OF POLICE OR REGULATORY POWERS

The Court is persuaded that the actions of Petitioners in asserting the claim of possession of the grain, in the alleged interest of depositors, and instituting legal proceedings in the Missouri courts, in an effort to solidify and strengthen their posture, are not an exercise of the police and regulatory powers of Missouri that would otherwise place Petitioners' activities within the exception to the

scope of the Bankruptcy Court's jurisdiction under Title 11 U.S.C. § 362(b)(4).[9]

It is plain Petitioners are not endeavoring to prevent a violation of consumer protection, environmental protection, fraud or a similar police or regulatory law involving the safety, health, morals and the general welfare of society, but on the contrary, Petitioners' sole objective is to protect the pecuniary interests in property of purported depositors. Consequently, Petitioners' action does not fall within the *exception to the jurisdiction* of the Bankruptcy Court where a governmental unit is enforcing a police or regulatory power. *See*: 95 Cong. Rec. H 11092 September 28, (1978).

The United States Supreme Court in *Lawton* v. *Steele*, 152 U.S. 133 (1894), in discussing the extent and limits of a state's police power, made the following observation:

> ". . . It is universally conceded to include everything essential to the public safety, health and morals, and to justify the destruction or abatement . . . of whatever may be regarded as a public nuisance . . ."[10]

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[9]11 U.S.C. § 362(b)(4) provides:

> "The filing of a petition . . . does not operate as a stay—
>
> . . .
>
> (4) . . . of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;"

[10]The following are examples which have been regarded as a reasonable exercise of the police power: *Penn Central Transportation Co.* v. *City of New York*, 98 S.Ct. 2646 (1978) (New York City's Landmark Commission can designate the Grand Central Terminal an historic landmark and thereafter prohibit the construction of a multi-story tower above it; *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962) (municipality can prohibit sand and gravel operations beneath the water table within its borders); *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440 (1960) (city can regulate air pollution emanating from federally licensed vessels); *Miller* v. *Schoene*, 276 U.S. 272 (1928) (state entomologist can order the cutting of red cedar trees to protect apple

(Continued on next page)

B. WAIVER OF SOVEREIGN IMMUNITY

Petitioners, on September 3, 1980, petitioned the Bankruptcy Court to determine ownership of the grain, and for an order of the Court permitting liquidation and distribution of the proceeds. Nineteen days later, and on the date the Bankruptcy Court scheduled a hearing on Petitioners' request, Petitioners served notice of dismissal of their application for affirmative relief.

Petitioners also petitioned the Bankruptcy Court for an order modifying the Trustee's bond which they stipulated should be set at $1,000,000.

The Court is presuaded that the Bankruptcy Court's jurisdiction, unlike the jurisdiction of other tribunals, can be waived as a substantive matter. Rule 915 of the Bankruptcy Rules provides that a party consents to jurisdiction of an adversary proceeding if he does not promptly make objection in a timely answer or motion.

It is plain that a state is not immunized from the provisions of the Bankruptcy Code. 11 U.S.C. § 542 provides for the turnover of property by an "entity." An entity includes, by definition, any "person, estate, trust, governmental unit." 11 U.S.C. 101(14). And governmental unit means "... State ... or instrumentality of ... a State" 11 US.C. § 101(21).

Petitioners invoked the jurisdiction of the Bankruptcy Court by filing a written pleading seeking affirmative relief; they were not obligated to follow this course of action, but did so in an attempt to benefit themselves. In so doing,

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Footnote continued
orchards from cedar rust disease); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915) (municipality can ban brickyards within its boundaries); *Lawton* v. *Steele*, 152 U.S. 133 (1894) (state official can destroy fish nets to enforce a New York fish and game statute).

Petitioners waived any arguable sovereign immunity.[11] *See*: *In Re Crisp*, 521 F. 2d 172 (2nd Cir. 1975); *Gardner* v. *New Jersey*, 329 U.S. 565 (1947); *Gwilliam* v. *United States*, 519 F. 2d 407 (9th Cir. 1975); *In Re Dolard*, 519 F. 2d 282 (9th Cir. 1975).

SUPREMACY CLAUSE

The Bankruptcy Act of 1978 has its origin from an express grant of authority in the United States Constitution, Article I, § 8, clause 4 empowering Congress:

> "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

In *Katchen* v. *Landy*, 382 U.S. 323 (1966), the Supreme Court emphasized that courts of bankruptcy are vested with jurisdiction in law and in equity to implement the provisions of the Bankruptcy Act.

While the Court is persuaded that the Bankruptcy Code of 1978 does not annul a state's insolvency law,[12] the operative effects of such a state provision is suspended to the extent its enforcement would conflict with the Bankruptcy Code or with a Congressional policy. *See*: H. Rept. No. 95-959, 317; 11 U.S.C. § 106; *Perez* v. *Campbell*, 402 U.S. 637 (1971).

In *Perez* v. *Campbell*, supra, the Supreme Court held an Arizona Motor Vehicle Safety Responsibility Act—

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[11]Petitioners or their representatives appeared in person, before the Bankruptcy Court, received copies of the orders entered by the court, but took no steps to appeal such orders or object to the jurisdiction of the court to enter such orders. Petitioners relinquished possession of debtors' warehouses, and the keys thereto, to the Trustee and agreed not to intrfere with the Trustee's operation of debtors' businesses.

[12]The Court is of the view that paragraph 6 of Missouri Warehouse Grain Act § 411.519 is in the nature of an insolvency measure. It is important to note that Petitioners based their state court proceeding on paragraph 6 in requesting the appointment of a receiver and injunctive relief against the Trustee and debtors.

which provided "discharge in bankruptcy following the rendering of any such judgment [as a result of an automobile accident] shall not relieve the judgment debtor from any of the requirements of this article"—unconstitutional and violative of the supremacy clause since the measure was in direct conflict with a provision of the Bankruptcy Act.

It is universally recognized that state legislation that frustrates the full implementation and effectiveness of federal law is invalidate by the Supremacy Clause of the Federal Constitution. *Perez* v. *Campbell,* supra; United States Constitution, Art. VI, cl. 2.

OWNERSHIP OF THE GRAIN PRESENTS A FACTUAL ISSUE

In *Ex Parte In The Matter of Chicago, Rock Island & Pacific Railway Company, Petitioner,* 255 U.S. 273 (1921), the Supreme Court made the following pertinent expression:

> "There is a well-settled rule by which this court is guided upon applications for writ of prohibition to prevent a lower court from wrongfully assuming jurisdiction of a party, of a cause, or of some collateral matter arising therein. If the lower court is clearly without jurisdiction the writ will ordinarily be granted to one who at the outset objected to the jurisdiction, has preserved his rights by appropriate procedure and has no other remedy. . . . If, however, the jurisdiction of the lower court is doubtful, . . . ; or if the jurisdiction depends upon a finding of fact made upon evidence which is not in the record, . . . ; or if the complaining party has an adequate remedy to appeal or otherwise, . . . ; the writ will ordinarily be denied. . . ."

In *United States* v. *Boe,* 543 F. 2d 151 (1976 Cust. &

Pat. App.) the Court stressed that a party requesting writ of prohibition has the burden of showing a clear and indisputable right to relief and must demonstrate exceptional circumstances necessitating the relief sought.

Petitioners concede that the debtors own 2.3% of the grain in dispute. On the other hand, the Trustee contends that all of the grain constitutes an asset of the debtors' estate. Intervenors—45 Arkansas farmers—assert emphatically that a substantial portion of the grain, if not all, belongs to them.

The Trustee has failed a petition in the Bankruptcy Court for permission to sell the grain. The Court was advised during oral argument that both Arkansas and Missouri farmers have filed answers either acquiescing in the request or opposing it.

Surely, confronted with this posture of the proceedings, the Bankruptcy Court must determine ownership before affording any relief on the Trustee's application to sell the grain.

The Court is of the view that not only would it be improvident to issue a writ of prohibition in light of the existence of a fact question to be resolved, but, for the additional reason, the Petitioners are not without an adequate remedy in the event they should not prevail in the Bankruptcy Court. Petitioners' right to an appeal from a decision of the Bankruptcy Court is secured under the Bankruptcy Code.

The Court is persuaded that *Ex Parte In the Matter of Chicago, Rock Island & Pacific Railway Company, Petitioners,* supra, is applicable here.

CONCLUSION

The Court is persuaded that Petitioners' request for writ of prohibition to the Bankruptcy Court for the Eastern District of Arkansas, Jonesboro Division, and the Honorable Charles Baker, Bankruptcy Judge, should not be granted so far as Petitioners' request relates to the jurisdiction of the Bankruptcy Court to assume control over the grain located in debtors' warehouses; accordingly, said petition be, and it is hereby, dismissed in part; and,

The Court is of the opinion that Petitioners' petition appears to state a meritorious case regarding the proposed proceedings against Petitioners for purportedly disobeying orders of the Bankruptcy Court. Accordingly, the Honorable Charles Baker and the Bankruptcy Court for the Eastern District of Arkansas, Jonesboro Division, are hereby ordered and directed to answer the petition, so far as said petition relates to the proposed contempt proceeding contemplated by the Bankruptcy Court, with brief in support thereof, within ten days of service of this order upon the Honorable Charles Baker.

IT IS FURTHER ordered that the Clerk of this Court be, and he is hereby, directed to serve a copy of this instrument upon the Honorable Charles Baker, Bankruptcy Judge, and Robert S. Lindsey, Trustee of debtors' estate.

Dated this 2nd day of December, 1980.

George Howard, Jr.
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF ARKANSAS

In re: STATE OF MISSOURI; STATE OF MISSOURI EX REL JOHN G. RUNYAN, AS DIRECTOR OF THE MISSOURI DEPARTMENT OF AGRICULTURE: STATE OF MISSOURI EX REL MISSOURI DEPARTMENT OF AGRICULTURE; JOHN G. RUNYAN, AS RECEIVER OF CERTAIN GRAIN WAREHOUSES; and STATE OF MISSOURI EX REL JOHN ASHCROFT, ATTORNEY GENERAL OF THE STATE OF MISSOURI, *Petitioners*	LR-C-80

PETITION FOR WRIT OF PROHIBITION
PURSUANT TO 28 U.S.C. § 1651

COMES NOW the State of Missouri, the Missouri Department of Agriculture, John G. Runyan as Director of the Missouri Department of Agriculture, John Ashcroft, Attorney General of the State of Missouri and John G. Runyan in his capacity as receiver pursuant to orders dated August 12, 1980 of the Missouri Circuit Court of five grain warehouses described herein and located in the State of Missouri (together, the "Petitioners"); and, pursuant to 28 U.S.C. § 1651 and all other applicable statutes, rules and laws, and in accordance with an order dated October 21,

1980 issued by the United States Court of Appeals for the Eighth Circuit, the Petitioners hereby respectfully petition this Court to issue a Writ of Prohibition prohibiting the United States Bankruptcy Court for the Eastern District of Arkansas, Jonesboro Division (the "Bankruptcy Court") and Hon. Charles W. Baker, a Bankruptcy Judge of that Court (the "Bankruptcy Judge") (together, the "Respondents") (1) from exercising any power or authority over or with respect to (a) the Petitioners' enforcement of the Missouri Grain Warehouse Law (Chapter 411, R.S. Mo.) and the Missouri Grain Dealers Law (Chapter 276, R.S. Mo.) (together, the "Missouri Grain Laws"), or from prohibiting or impending Petitioner's enforcement of those laws or regaining possession of the grain in such five grain warehouses or (b) the grain contained in such five public grain warehouses, which is owned by the depositors of such grain and holders of receipts issued therefor by such warehouses and is subject to the jurisdiction of Petitioners and the Circuit Court of the State of Missouri for the protection of such depositors and receipt holders, and (2) from initiating, prosecuting, hearing or deciding any proceedings to hold any of the Petitioners in contempt of court; and in support of the relief requested, Petitioners respectfully allege the following:

Prior Prohibition Proceedings and Brief Summary of This Controversy

1. On October 21, 1980 the Petitioners petitioned to the Court of Appeals for the Eighth Circuit for the issuance of a Writ of Prohibition against the Respondents so as to prohibit the Respondents' exercise of extra-jurisdictional power as described herein. The petition was made to that Court because of an urgent need for relief. On the evening of October 20, 1980, the Respondent Bankruptcy Judge placed a telephone call to Petitioners' counsel at his home. He stated that contempt proceedings would be heard against

the Director of the Missouri Department of Agriculture (the "Department") at 9:00 A.M. on October 22, 1980 at the Bankruptcy Court in Little Rock, Arkansas.

2. This threatened contempt proceeding against the Director, a duly constituted official of the State of Missouri, was in response to the commencement by the Director on October 20, 1980 of a proceeding to enforce the Missouri Grain Laws in the Circuit Court of New Madrid County, Missouri, and the issuance by that Court of an order directing the Director to take possession of the grain in certain public warehouses located in Missouri. That proceeding was begun at the direction of Honorable Joseph Teasdale, the Governor of the State of Missouri. The Governor was concerned with the hardship caused to hundreds of farmers unable to get their grain out of these Missouri warehouses because of proceedings in, and orders granted by, Respondents in bankruptcy cases of the warehouse companies pending before Respondents.

3. In that State court proceeding, the Court, as authorized by the Missouri Grain Laws, issued an order dated October 20, 1980 (the "Enforcement Order") directing that the Director of the Department take possession of and seize five Public Grain Warehouses, including the grain and records contained therein, formerly operated by two debtor partnerships and one debtor corporation that had filed voluntary bankruptcy proceedings pending in the Bankruptcy Court. A copy of the Enforcement Order dated October 20, 1980 issued by the Circuit Court of New Madrid County, Missouri is included as Exhibit A in the Petitioners' accompanying exhibit volume (the "Exhibit Volume"). All exhibits in the Exhibit Volume are hereby incorporated by reference herein as if set forth at length herein.

4. The issuance of the Missouri Circuit Court's Enforcement Order dated October 20, 1980 was not precluded by

the pendency of the bankruptcy cases for several reasons: The Respondents are without subject matter jurisdiction to prevent enforcement by Petitioners of the Missouri Grain Laws with respect to these public grain warehouses located in Missouri. The Missouri Grain Laws were enacted pursuant to the police and regulatory power of the state; the proc ding initiated by Petitioners in the Circuit Court on October 20, 1980 was to enforce their police and regulatory power pursuant to the Missouri Grain Laws. Respondents have no subject matter jurisdiction with respect to the grain contained in these warehouses, which is not part of the estate of the debtor companies; under the provisions of the Missouri Grain Laws, the grain is owned by the grain depositors and holders of receipts issued by those warehouses. The continued exercise of power, dominion and control by the Respondents over the grain contained in the public grain warehouses, the Respondents' issuance of orders authorizing the seizure of such grain from the Petitioners, the Respondents' declination to recognize that they have no jurisdiction with respect to such grain and that the Petitioners have the exclusive jurisdiction over this grain under the Missouri Grain Laws, the threatening of criminal contempt proceedings and imprisonment by the Bankruptcy Judge against the Petitioners, and the giving of only 36 hours' oral notice by the Respondents to the Petitioners' counsel, without giving written notice stating the essential facts constituting the contempt charged and whether the contempt was alleged to be civil or criminal or both and without allowing a reasonable time for preparation of a defense, although advised of the Petitioners' belief that the Respondents had no subject matter jurisdiction, are actions beyond the power and jurisdiction of the Respondents and are in violation of federal and state laws and the Constitution of the United States. Respondents have usurped power and acted in an extra-jurisdictional manner; they have at-

tempted, by the use of threats of force and contempt proceedings including the sanction of imprisonment, to force Petitioners not to exercise their lawful powers and duties.

5. Petitioners desired to avoid a confrontation between armed representatives of the State of Missouri, and United States Marshals, previously ordered by Respondents to take control of these warehouses in Missouri. Under these circumstances, Petitioners sought a Writ of Prohibition against Respondents from the Court of Appeals for the Eighth Circuit on October 21, 1980. The Court of Appeals issued its order dated October 21, 1980 in response to that petition, by which it (a) stayed all proceedings in Cause Nos. J-80-154-B and J-80-155-B, described below, pending in the Bankruptcy Court until the Petitioners presented a petition for a Writ of Prohibition to this Court and this Court has ruled upon such petition and (b) denied the Petitioners' petition for such writ without prejudice to the filing of a petition for a Writ of Prohibition in this Court on or before October 30, 1980. A copy of the order dated October 21, 1980 issued by the Court of Appeals for the Eighth Circuit is included as Exhibit B in the Exhibit Volume.

The Debtor Companies, Their Bankruptcy Cases and Their Missouri Grain Warehouses

6. Cause Nos. J-80-154-B and J-80-155-B pending in the Bankruptcy Court, referred to in the October 21, 1980 order of the Court of Appeals, were filed on August 11, 1980 as voluntary bankruptcy cases by Donald R. James, Robert W. James and George E. James, Jr. (the "Jameses") doing business under various partnerships and other names including Cox Cotton Company, James Grain & Cotton Company, Frisbee Cotton Company, James Grain & Elevator Company and James Gin & Elevator Company (the "Partnership Debtors"). The Partnership Debtors originally filed

these proceedings for their liquidation pursuant to Chapter 7 of the Bankruptcy Code; on or about September 22, 1980 they converted their liquidation cases to reorganization cases under Chapter 11 of the Bankruptcy Code.

7. Robert P. Lindsey (the "Bankruptcy Trustee") was appointed interim trustee of the Partnership Debtors by the Bankruptcy Court on or about August 12, 1980, several days after the Partnership Debtors turned over physical possession and control of their Missouri public grain warehouses to the Director and his staff on August 8, 1980.

8. On August 12, 1980 the Director was appointed receiver of these warehouses by the Missouri State courts. Petitioners believe that the Bankruptcy Trustee qualified as such after the Director was appointed receiver of the public grain warehouses on August 12, 1980 by the Missouri Circuit Courts of the counties in which the public grain warehouses are located.

9. Four of these public grain warehouses, located at New Madrid (Ristine), Holcomb, Caruthersville and Naylor, all in Missouri, had been operated by the Partnership Debtors. The fifth public grain warehouse, located at Neelyville, Missouri, has been operated by a corporation controlled by the Jameses, James Agri-Center, Inc. (the "Corporate Debtor"). The Corporate Debtor filed a voluntary reorganization case under Chapter 11 of the Bankruptcy Code on August 11, 1980, and is a debtor in possession; no trustee has been appointed for the Corporate Debtor. The five public grain warehouses formerly operated by the Partnership Debtors and the Corporate Debtor are herein called the "Public Grain Warehouses".

The Parties to This Proceeding

10. The Petitioners are the following: State of Missouri, a sovereign state seeking to terminate the extrajurisdic-

tional exercise of power by the Respondents which is preventing the enforcement of its laws by its authorized officials and employees; John G. Runyan, as Director of the Department, and the Department, both of whom are charged by law with enforcement of the Missouri Grain Laws; John G. Runyan, as receiver of the grain in the Public Grain Warehouses, appointed as such on August 12, 1980 by the Circuit Courts for the Counties of New Madrid, Dunklin, Pemiscot, Ripley and Butler, State of Missouri, pursuant to the Missouri Grain Laws; and John Ashcroft, the Attorney General of the State of Missouri, charged with the duty to enforce laws of the State of Missouri.

11. The Respondents are: the Bankruptcy Court, a separate department of the United States District Court for the Eastern District of Arkansas, in which the bankruptcy proceedings of the Partnership Debtors and Corporate Debtor are pending; and the Bankruptcy Judge, a judge of the Bankruptcy Court before whom such bankruptcy proceedings of the Partnership Debtors and Corporate Debtor are pending.

12. Relief is not sought by this petition against the Partnership Debtors or Corporate Debtor, nor against the Bankruptcy Trustee. Relief is sought against Respondents, whose exercise of power beyond their jurisdiction has enabled the Bankruptcy Trustee to gain dominion and control over the four Public Grain Warehouses formerly operated by the Partnership Debtors and of the grain contained therein, and has prevented the lawful exercise of jurisdiction, possession and control over such grain by Petitioners.

13. Such grain is not owned by the Partnership Debtors' estates but is owned by the depositors and receipt holders. Without any colorable basis in law, the Bankruptcy Trustee in proceedings before Respondents, has asserted ownership of the grain in the four Public Grain Warehouses of which

he is trustee. This claim is in violation of the Missouri Grain Laws under which the depositors and receipt holders are the owners; under the Missouri Grain Laws, Petitioners have the duty to protect the depositors and receipt holders and to enforce the provisions of such laws. Respondents are preventing such enforcement.

This Controversy Involves Extraordinary Circumstances and Respondents' Usurpation of Power

14. The controversy between Petitioners and Respondents involves extraordinary circumstances. Nonexistent jurisdiction has been asserted by the Bankruptcy Judge over the State of Missouri and its duly constituted authorities including particularly the Department, its Director and the Missouri Circuit Court. The Respondents have willfully disregarded the legislative policy of the State of Missouri as contained in its Grain Warehouse Laws, enacted pursuant to the State's police power to regulate an industry affecting the public interest. Petitioners' possession of the grain in these warehouses was obtained by means of its voluntary surrender by the debtor companies and orders issued by the Missouri courts. Petitioners' enforcement efforts have been met by contempt proceedings orally ordered by Respondents.

15. Under the Missouri Grain Warehouse Law, the Director has the right and duty to enforce its provisions, which have been exercised by him in various respects including:

(a) The Director's acceptance on August 8, 1980 of, and his exercise of dominion and control over, the grain in the Public Grain Warehouses, which was voluntarily given by the Partnership and Corporate Debtors to the Director on August 8, 1980 pursuant to instruments dated that date executed by these Debtors. Copies of the Debtors' instruments turning over possession to the Director are included in the Exhibit Volume as Exhibit C;

(b) The filing of petitions by the Director with the Circuit Courts of the State of Missouri for the five Counties in which the Public Grain Warehouses are located for his appointment as receiver of the grain contained therein, which petitions were granted by orders of the Missouri Circuit Courts dated August 12, 1980, and by his acting as receiver thereunder until ousted by means of intimidation and threats by the Bankruptcy Trustee and United States Marshals invoked by order dated September 15, 1980 issued by the Respondents. A copy of one of the August 12, 1980 orders appointing the Director as such receiver as included in the Exhibit Volume as Exhibit D. A copy of the order of the Respondents dated September 15, 1980 (as of September 11, 1980) invoking United States Marshals and used to oust Petitioners from the Public Grain Warehouses, together with the application of the Bankruptcy Trustee upon which it was granted, is included in the Exhibit Volume as Exhibit E; and

(c) The commencement in good faith of a proceeding (Case No. CIV180-353CC) on October 20, 1980 in the Circuit Court of New Madrid County, Missouri, by the Petitioners as plaintiffs against the Bankruptcy Trustee and others (a) to enforce provisions of the Missouri Grain Warehouse Law and (b) for an order granting immediate possession of the grain contained in the Public Grain Warehouses to the Director and for other relief, and obtaining the Enforcement Order of that Court in that proceeding dated October 20, 1980. Copies of the Petitioners' petition therein, motion for temporary restraining order and preliminary injunction, affidavit of John G. Runyan, Director, Missouri Department of Agriculture, and memorandum of law, together with all exhibits thereto, filed in that proceeding, are included as Exhibit F in the Exhibit Volume. The Enforcement Order issued on those papers is included as Exhibit A.

16. The Director, the Department and their employees were in possession and control of these Public Grain Warehouses commencing on August 8, 1980; they remained in possession and control without interruption from that date until September 17, 1980, subsequent to the filing of the Debtors' bankruptcy cases and the appointment of the Bankruptcy Trustee.

17. On September 17, 1980 the Bankruptcy Trustee ousted the Director and employees of the Department without right, by unlawful means and aided by actions of Respondents in excess of their jurisdiction. Based on Respondents' order dated September 15, 1980 (Exhibit E), the Bankruptcy Trustee threatened the Director with contempt proceedings before the Respondents if possession and control was not turned over; and United States Marshals, acting under the color of the September 15, 1980 order of the Respondents, intimidated employees of the Department. Solely as a consequence of such actions, the Director and employees of the Department relinquished to the Bankruptcy Trustee and such United States Marshals possession of the Public Grain Warehouses other than the one at Nellyville.

18. Through the extra-jurisdictional exercise of power by Respondents, Petitioners were intimidated and forced not to exercise their lawful powers with respect to this grain and not to enforce the Grain Warehouse Laws. When Petitioners subsequently attempted to do so by obtaining the Enforcement Order on October 20, 1980, Petitioners were directed by Respondents to attend before Respondents to be prosecuted for contempt.

Ownership of the Grain

19. All of the grain in these warehouses, having a value exceeding $5 million, has been continuously owned from the time it was delivered to these Public Grain Warehouses for storage and at present is still owned by the depositors

and receipt holders. By law, the receipt holders and depositors have been entitled to the delivery of this grain upon demand; by virtue of orders of Respondents, the receipt holders and depositors have had their grain withheld, in violation of their unquestioned rights under the laws of the State of Missouri and the Constitution of the United States. In proceedings before Respondents, the Bankruptcy Trustee has asserted that he owns this grain, despite the clear and controlling pronouncement of the law of the State of Missouri that the depositors and receipt holders are the owners of grain deposited for storage. The Department has determined from its records of transactions involving grain in the Public Grain Warehouses that the grain contained therein was deposited for storage; such grain is not property of the estate of these Debtors and the Bankruptcy Trustee does not even have a colorable claim to the ownership of such grain. The Department has also determined that such grain depositors prepaid the storage charges for their grain to a date subsequent to the appointment of the Bankruptcy Trustee.

20. The Department and its Director are charged by law with enforcement of the grain laws of Missouri, including its provisions mandating that grain stored in public warehouses be distributed to its owners upon their demand. The Petitioners have been thwarted by Respondents in their efforts to enforce these provisions of the grain laws of Missouri, which were enacted pursuant to the police and regulatory power of the State. There are hundreds of depositors and receipt holders, including many farmers whose property rights are being violated and whose ownership rights have been denied by actions of the Bankruptcy Trustee, with the aid and support of the Respondents. The Respondents have issued notices, directives and orders which have effectively supported the Bankruptcy Trustee's assertion of jurisdiction over the grain in storage in the

Public Grain Warehouses and have prevented the Petitioners from performing their duty to enforce provisions of the Missouri Grain Laws.

21. The quality of the grain contained in these Missouri grain warehouses may be adversely affected if it is not turned and treated in the near future. During the period from August 8, 1980 to September 17, 1980, when Petitioners were in possession of these Missouri warehouses, Petitioners caused this grain to be properly cared for. Petitioners believe that since September 17, 1980 the Bankruptcy Trustee has failed to cause the grain to be turned and treated; the Bankruptcy Trustee stated to Petitioners that those debtor estates did not have the funds to care for this grain. One reason Petitioners took steps on October 20, 1980 to regain possession of this grain was to enable them to insure that the grain would be turned and treated, thereby preserving its quality. Petitioners have been prepared and remain willing and able to expend the necessary funds for this purpose when they regain possession. A sale of this grain by the bankruptcy authorities would not solve the problem involved. All of the owners of the grain, as owners, have the right to decide for themselves the timing of a sale of their own grain. In this case the bankruptcy authorities, as warehousemen, are not performing the warehouseman's basic obligation of caring for the grain so that grain of the same quality as originally deposited is returned to the depositors. Petitioners seek possession of the grain so that that obligation under law in favor of the depositors will be fully performed.

Petitioners' Right and Duty to Enforce the Law is not Precluded by any Bankruptcy Legislation

22. The Petitioners have the legal right and duty to take action, including the commencement and continuation of enforcement proceedings, to protect the rights of such

depositors and receipt holders, to preserve the integrity of the administration of the Missouri Grain Laws by the duly constituted authorities of the State and to uphold the laws of the State.

23. Neither the Bankruptcy Code, nor 28 U.S.C. § 1471 nor any other provision of Public Law 95-598, which became law in 1978 and by which the Bankruptcy Code and 28 U.S.C. § 1471 were enacted by Congress, contains any provision authorizing Respondents to exercise jurisdiction over this grain in which the estates of these Debtors have no ownership interest or to thwart the Petitioners in the exercise and performance of their lawful functions pursuant to the Missouri Grain Laws enacted in furtherance of the police and regulatory powers of the State of Missouri. The Respondents are without subject matter jurisdiction over this grain and have no jurisdiction to prevent the Petitioners from enforcing the Missouri Grain Laws.

24. The Bankruptcy Trustee is engaging in activities at the Public Grain Warehouses without having the licenses required by the Missouri Grain Laws. On or about October 16, 1980 the Bankruptcy Trustee filed license applications with the Department for warehouse and dealer licenses (Exhibit J); the Department has preliminarily determined that these applications are deficient. Among other things, such license applications did not include statements of assets and liabilities of the applicant, as required by law. By the terms of an *ex parte* order dated September 11, 1980 granted by Respondents to the Bankruptcy Trustee, the Bankruptcy Trustee was permitted to file license applications in such manner. A copy of the September 11, 1980 *ex parte* order of Respondents is included in the Exhibit Volume as Exhibit G. In that order the Respondents made a finding that the Bankruptcy Trustee should comply with Missouri law, but only "to the extent possible". Respondents had no jurisdiction to authorize the Bankruptcy Trustee

not to comply with the Missouri Grain Laws in all respects. The license applications, as approved by Respondents and filed with the Department by the Bankruptcy Trustee, deny that the Bankruptcy Trustee holds any property of others; in these license proceedings before the Department, the Bankruptcy Trustee, apparently with Respondents' support, thus claims to be the owner of this grain, although there is no colorable basis for such a claim.

25. The Bankruptcy Trustee asserts that the Bankruptcy Code supersedes and takes precedence over all laws of the State of Missouri with respect of the regulation of public grain warehouses and their operations; this assertion is contrary to federal law, which mandates that the Bankruptcy Trustee comply with applicable State law. The Bankruptcy Trustee is in violation of his obligations under 28 U.S.C. § 959(b), and Respondents have permitted him to do so in order to exercise dominion and control over the Public Grain Warehouses without compliance with the law of the State of Missouri.

26. Petitioners have the legal duty to enforce the provisions of the Missouri Grain Laws under which the depositors and receipt holders are entitled to possession of their grain upon demand. The Bankruptcy Trustee has thwarted the performance of that duty, and has prevented hundreds of depositors and receipt holders, including many farmers, from obtaining possession of their property. The actions of the Bankruptcy Trustee are in direct conflict with the enforcement efforts of the Petitioners. The Respondents are shielding the Bankruptcy Trustee from the enforcement proceedings of Petitioners and are shielding the Bankruptcy Trustee's continuing operations in Missouri in violation of the Missouri Grain Laws.

Respondents' support of Bankruptcy Trustee's efforts— Trustee's Suit against Hundreds of Farmers

27. On or about September 23, 1980, the Bankruptcy Trustee filed an adversary proceeding complaint for authority to sell the grain in the Partnership Debtor's four Public Grain Warehouses; the complaint was filed with the Bankruptcy Court. In that complaint, the Bankruptcy Trustee named several hundred defendants, consisting mostly of the farmers, depositors and receipt holders of this grain; in his complaint the Bankruptcy Trustee asserted that he was the owner of this grain. A claim of ownership of this grain by the Bankruptcy Trustee was not clearly made prior to September 23, 1980. By his complaint, the Bankruptcy Trustee would require hundreds of farmer-depositors of grain, residents of Missouri, to engage, at substantial expense to themselves, lawyers in the Little Rock, Arkansas area to file responses to his complaint. This is a substantial burden on the grain depositors. Petitioners are charged by the Missouri Grain Warehouse Law with the duty of protecting these depositors and warehouse receipt holders. Petitioners initiated their Missouri enforcement action and obtained the Enforcement Order dated October 20, 1980 after the Bankruptcy Trustee finally and clearly declared his intention, without basis in law or in fact, to claim ownership of this grain. The Respondents have no jurisdiction to permit the withholding of this grain and to prevent Petitioners' enforcement proceedings.

Respondents Authorized a Wrongful Seizure

28. Prior to the filing of the Debtors' voluntary bankruptcy cases on August 11, 1980, the Partnership Debtors voluntarily turned over possession and control of the Public Grain Warehouses to the Director and the Department.

(Exhibit C). By orders dated August 12, 1980 the Director was appointed receiver of the Public Grain Warehouses prusuant to the Missouri Grain Warehouse Law. (Exhibit D). Employees of the Department continued in possession of the warehouses from August 8, 1980 until ousted on September 17, 1980 by the Bankruptcy Trustee and United States Marshals, appointed for such purpose by the Respondents; these Marshals and the Bankruptcy Trustee employed intimidation and threats of contempt against Petitioners. Previously, acting contrary to law, the Respondents issued their *ex parte* order dated September 11, 1980 (Exhibit G), by which, in paragraph 5, the Respondents ordered the Department to remove all security devices from these Public Grain Warehouses so that the Bankruptcy Trustee could take possession of the warehouses. Under those circumstances, on September 17, 1980, Petitioners relinquished possession of the warehouses to the Bankruptcy Trustee.

Missouri Enforcement Proceeding

29. On October 20, 1980, Petitioners commenced a proceeding (Case No. CV180-353CC) in the Circuit Court of New Madrid County, Missouri (the "Missouri Enforcement Proceeding") against the Bankruptcy Trustee for the two Partnership Debtors and also against the Corporate Debtor, which is operating its Neelyville, Missouri warehouse as a debtor in possession. (Exhibit F contains the documents in the Missouri Enforcement Proceeding). In so doing Petitioners acted pursuant to the express provisions of the Missouri Grain Laws to enforce those laws enacted pursuant to the police and regulatory power of the State.

30. The direct object of the Missouri Enforcement Proceeding was to obtain an order directing the Director to take immediate possession of and seize the five Public Grain

Warehouses and the grain and records therein, formerly operated by the three Debtor companies, four of which warehouses are presently under the control of the Bankruptcy Trustee. These warehouses and the grain therein are subject to the Missouri Grain Laws and the exclusive jurisdiction of the Department and the Director. The Enforcement Order was issued on October 20, 1980. (Exhibit A).

Respondents Threatened Contempt in Response to the Missouri Enforcement Proceeding

31. A copy of the Enforcement Order was served on the Bankruptcy Trustee during the afternoon of October 20, 1980. It triggered an almost immediate response from the Bankruptcy Judge. During the evening of October 20, 1980, the Petitioners' counsel, James F. Gunn, received a telephone call at his home from the Bankruptcy Judge who stated that he had been provided with a set of the legal papers in the Petitioners' Missouri Enforcement Proceeding. The Bankruptcy Judge stated in substance to Mr. Gunn, among other things, that he considered the commencement of the Missouri Enforcement Proceeding to be a contempt, that on October 21, 1980 the Bankruptcy Trustee would file papers with the Bankruptcy Court to hold the Director of the Missouri Department of Agriculture, Petitioner Runyan, in contempt, that Mr. Gunn's appearance on behalf of the Petitioners was required before the Bankruptcy Judge on October 22, 1980, at 9:00 a.m. in regard to such contempt proceedings and that if the facts were as the Bankruptcy Judge understood them to be, he would enter such contempt orders. The Bankruptcy Judge also said that he was reminding Mr. Gunn that the Bankruptcy Court could enforce its orders with the aid of United States Marshals, a procedure previously employed by the Respondents in these bankruptcy cases to wrest possession of these warehouses from employees of the Department. Mr. Gunn stated to the

Bankruptcy Judge during their conversation that in his opinion the Bankruptcy Court was acting beyond its power because (a) the Bankruptcy Court had no jurisdiction over the grain in the Public Grain Warehouses in view of the ownership of such grain by the depositors and the holders of warehouse receipts issued out of those warehouses, and (b) the Bankruptcy Court had no jurisdiction under the Bankruptcy Code to prevent the State of Missouri from enforcing the Missouri Grain Laws which are police and regulatory enactments of the State.

32. On the following day, October 21, 1980, the Bankruptcy Judge sent telegrams to the Director and to James F. Gunn stating that a hearing would be held before the Bankruptcy Court at 9:00 a.m. on October 22, 1980 in Case No. JO 80-155 on (a) the Bankruptcy Trustee's motion for a preliminary restraining order and permanent injunction against the Director enjoining him and his employees from interfering with the property of the Debtors' estates and (b) the Trustee's motion for an order to show cause why the Director shall not be held in contempt of the Bankruptcy Court. The telegrams were not received until subsequent to the hearing ordered by Respondents for 9:00 a.m. on October 22, 1980; nor were the Petitioners or their attorneys or counsel served by that time with any such motions by or on behalf of the Trustee. No written notice stating the essential facts constituting the contempt charges, or whether the charges were criminal or civil or both, was given by that time to the Director or his attorneys by the Respondents or the Bankruptcy Trustee; nor was a reasonable time for the preparation of any defense afforded by the Respondents to the Director, as required by Rule 920(a)(2) of the Rules of Bankruptcy Procedure. A copy of such telegram to Petitioners' counsel is included as Exhibit H in the Exhibit Volume.

33. Subsequent to October 22, 1980, the Petitioners caused the files of the Bankruptcy Court to be examined and in that manner learned for the first time that the Bankruptcy Trustee filed a complaint (the "Contempt and Injunction Complaint") with the Bankruptcy Court for a contempt citation against the Director of the Department, the Department itself, the Attorney General of Missouri and two employees of the Missouri Grain Inspector. A copy of the Contempt and Injunction Complaint is included in the Exhibit Volume as Exhibit I. The Contempt and Injunction Complaint specifically sought a "trial" on that Complaint on October 22, 1980 at 9:00 a.m. before the Bankruptcy Court and it specifically requested a finding that all of the Petitioners be held in civil and criminal contempt. The trustee also specifically requested in his Complaint that jail sentences be imposed (Complaint, pages 13 and 18). Despite the extreme seriousness of seeking imprisonment of State officials acting in good faith, and despite a trial ordered by Respondents for 9:00 a.m. on the next day, a copy of the Contempt and Injunction Complaint was merely mailed to the Director's attorney, on October 21, 1980; personal service was not even attempted. The certificate of service annexed to the Contempt and Injunction Complaint stated that a copy was mailed to the post office box of a Missouri Assistant Attorney General on October 21, 1980. Such procedures and method of service were unconstitutional and failed to comply with Bankruptcy Rule 920. It was a virtual impossibility that the Petitioners could have received the 18 page Contempt and Injunction Complaint before they were expected to go before the Bankruptcy Court to defend themselves in a contempt trial at 9:00 a.m. on the following date at a place distant from the Assistant Attorney General's Office. The conduct of the Respondents was improper and in violation of the Rules of Bankruptcy Procedure and the Constitution of the United States. The

Respondents failed to act properly by not directing that service of the Contempt and Injunction Complaint be effected upon each and every one of the Petitioners and their attorneys substantially in advance of a reasonable trial date. Respondents participated in this attempted deprivation of Petitioners' constitutional rights. The Respondents' order by telephone on October 20, 1980 and subsequent actions requiring an almost immediate contempt trial violated such Rules and the Constitution. These actions were calculated to deprive the Petitioners of their constitutional rights, in addition to depriving them of the ability to perform their lawful duties of enforcing the Missouri Grain Laws. The Respondents have become advocates in these proceedings instead of confining their role to that of impartial adjudicators, and have exercised, with an inappropriate sense of urgency, powers in excess of their jurisdiction in order to prevent Petitioners from enforcing the Missouri Grain Laws.

34. The contempt action threatened by the Respondents against the Petitioners, in violation of the Rules of Bankruptcy Procedure, was designed to force the Petitioners to discontinue their lawful enforcement of the Missouri Grain Laws and to surrender to Respondents' exercise of extrajurisdictional power; this amounted to a usurpation of power not granted by Congress. Congress has not granted the Bankruptcy Court power to prevent a State from enforcing its statutes enacted pursuant to its police or regulatory power, nor did Congress grant to a Bankruptcy Court power to seize and control property which is not a part of the estate of a debtor. In noticing the hearing in the contempt proceeding, the Bankruptcy Court exceeded its powers, as limited by 28 U.S.C. § 1481, which withholds any jurisdiction on the part of the Bankruptcy Court to punish a criminal contempt not committed in the presence of the Bankruptcy Judge or warranting a punishment of imprisonment.

35. Solely as a consequence of the stay issued by the Court of Appeals on October 20, 1980, none of the proceedings of which Respondents gave notice of hearing for October 22, 1980 were held.

36. Petitioners believe that the notice of contempt proceedings against the Petitioners given by the Respondents for October 22, 1980 was in violation of the temporary restraining provisions contained in the October 20, 1980 Enforcement Order issued by the Missouri Circuit Court. Petitioners have not initiated contempt proceedings, by reason of such violation, against Respondents or the Bankruptcy Trustee in the Missouri Circuit Court, nor have they sought enforcement of that order by invoking the aid of Missouri State Police, which could lead to a physical confrontation with United States Marshals, whose deployment was previously used on September 17, 1980 pursuant to an order of the Respondents (Exhibit E) and whose deployment was again threatened by the Bankruptcy Judge in his telephone conversation with James F. Gunn on the evening of October 20, 1980. Instead, Petitioners initiated their prohibition proceedings before the Court of Appeals for the Eighth Circuit on October 21, 1980 and now file this Petition with this Court so as to prevent the Respondents from continuing to act beyond their powers.

37. Further proceedings have developed in the Bankruptcy Court which make this an unusual case warranting the grant of a writ of prohibition. On or about October 24, 1980 approximately 49 petitioners filed a petition in the Bankruptcy Court to hold Missouri Governor Teasdale, Missouri Attorney General Ashcroft, the Department's Director Runyan and Honorable William L. Raglin, Circuit Judge of New Madrid County, Missouri, in contempt of court. The petitioners in that proceeding claimed that they are farmers who stored grain in Arkansas warehouses of the debtor

companies and that their grain allegedly became mixed with grain in the Missouri warehouses. They have asked that the Bankruptcy Court decide their claims and assert that these officials of the State of Missouri are guilty of willful contempt of the orders of the Bankruptcy Court, that they should be held in contempt, that they should be enjoined and restrained and that the grain should be sold by the Bankruptcy Trustee and the proceeds distributed. Petitioners believe that this is another move, violative of the Eleventh Amendment, to force Petitioners to capitulate to the claimed jurisdiction of the Bankruptcy Court. If, however, the grain owned by those Arkansas petitioners was converted by the debtors, then those petitioners are creditors of the debtor companies and should seek relief as creditors before the Bankruptcy Court. But that does not make the Missouri Grain Laws inoperative or confer jurisdiction in the Bankruptcy Court to oust Petitioners from enforcement of the Missouri Grain Laws with respect to the grain in the Missouri warehouses. The Bankruptcy Court simply has no lawful jurisdiction over this grain. If these claimants wish to assert ownership of any grain in the Missouri warehouses, they would have a full opportunity to do so in the Missouri Enforcement Proceedings; that is one of the very purposes of the Missouri Grain Laws. At most, their petition to hold Missouri officials in contempt raises a question of their claim to ownership of grain in Missouri. But the Bankruptcy Court has no jurisdiction with respect to a possible controversy, among competing ownership claims of third parties; the business of the bankruptcy courts, however, is limited to creditor claims against debtors and property of their estates. The Eleventh Amendment, moreover, prohibits the commencement of proceedings in a federal court of the type initiated by the Arkansas petitioners against these officials of the State of Missouri.

Various Violations of the Missouri Grain Laws

38. Enforcement of the Missouri Grain Laws by the Missouri authorities is essential in this case because of the Bankruptcy Trustee's outrageous claim of ownership of the grain in the Public Grain Warehouses, which has a market value in excess of $5 million and was deposited in the warehouses by hundreds of farmers. The Missouri Grain Warehouse Law, which incorporates the Missouri Uniform Commercial Code, clearly provides in § 411.491 that grain must be released to the depositor or receipt holder "upon demand". Petitioners are charged with the duty to enforce these laws. The Respondents are impeding performance of the obligation and duty of the Petitioners to enforce these laws.

39. The Bankruptcy Trustee is engaging in activities at these warehouses without having the licenses required by the Missouri Grain Laws. The Respondents have protected the Bankruptcy Trustee's activities in violation of the Missouri Grain Laws. They have protected such activities by granting orders authorizing inadequate license applications to be filed with the Department, by authorizing the Bankruptcy Trustee to take possession of the grain in the Public Grain Warehouses that does not belong to the estates of these debtors and by preventing the Petitioners from enforcing the Missouri Grain Laws. On or about October 16, 1980 the Bankruptcy Trustee, after being in office for about two months, finally filed license applications with the Department for warehouse and dealer licenses; the Department has preliminarily determined that these applications are deficient. In these applications, the Bankruptcy Trustee again wrongfully asserts that he does not hold any grain for others and that the Bankruptcy Code supersedes and preempts the Missouri Grain Laws. The Respondents are shielding the Bankruptcy Trustee's

continuing operations at the Missouri warehouses in violation of the Missouri Grain Laws. Copies of the Bankruptcy Trustee's license application, including the statement of assets and liabilities submitted by him to the Department and his attorneys' letter of transmittal, are included as Exhibit J in the Exhibit Volume.

40. The Respondents have assumed power to fix the amount of the bond required to be filed by the Bankruptcy Trustee with the Department in connection with licenses that might be granted to him under the Missouri Grain Laws. By order dated September 11, 1980 (Exhibit G), the Respondents fixed a $1 million bond as a combined bond in favor of the United States and the States of Arkansas and Missouri. The power to fix such bond is vested exclusively in the Department, and the Respondents were without power to make such order.

Prohibition is an Appropriate Remedy in this Case

41. There are numerous independent reasons why a Writ of Prohibition should be granted in this case:

(a) The Bankruptcy Court does not have subject matter jurisdiction to bar enforcement proceedings of the State of Missouri or to exercise jurisdiction over the grain, not part of the estate under Section 541 of the Bankruptcy Code; the grain is unquestionably owned by the depositors and receipt holders. The Bankruptcy Trustee does not even have a colorable claim of ownership, nor is there any colorable basis for jurisdiction in the Bankruptcy Court. The Missouri Enforcement Proceeding is grounded on the Missouri Grain Laws, which expressly authorizes seizure of grain in public warehouses by the Director when authorized by order of the Missouri Circuit Court. The Department and the Director were in lawful possession of this grain before these bankruptcy cases commenced, and the Director was appointed receiver of the grain in all of the warehouses by

orders of the Missouri Circuit Courts dated August 12, 1980. Both the Enforcement Order dated October 20, 1980 and the prior receivership orders are enforcement proceedings that are not related to the pending bankruptcy cases of these Debtors. The Missouri enforcement proceedings are beyond the jurisdiction of the Bankruptcy Court and could not have been removed to that Court by the express terms of 28 U.S.C. § 1478. The Respondents have no power to prohibit enforcement proceedings by the duly constituted authorities of the State of Missouri, and the Respondents have no power over property which is not part of the debtors' estates. The Respondents have acted in excess of the jurisdiction and power conferred on them by the Bankruptcy Code and related statutes. The grain owned by the depositors and receipt holders cannot be used by the Debtors or the Bankruptcy Trustee; the withholding of this grain and the exercise of jurisdiction over it and the thwarting by the Respondents, by ordering contempt proceedings, of the enforcement of the Missouri Grain Laws is beyond the lawful jurisdiction and powers of the Respondents.

(b) It was not intended by the Bankruptcy Code or related enactments contained in Public Law 95-598, by which the Bankruptcy Code was enacted in 1978, that bankruptcy courts have jurisdiction to prohibit or impair enforcement by State authorities of state statutes enacted pursuant to the police or regulatory power of a State or to withhold from the owners property in which the estate has no interest. If a provision of the Bankruptcy Code were construed so as to grant such power and jurisdiction to a Bankruptcy Court, such provision so construed would be unconstitutional under Article 1, Section 8, Clause 4 of the United States Constitution. That provision, the only basis for the enactment of bankruptcy laws by Congress, authorizes Congress to enact ". . . uniform Laws on the subject of Bankruptcies throughout the United States; . . ." A law

that would prohibit the enforcement of police power statutes by a state, not involving property of a debtor, would not be a law "on the subject of Bankruptcies", but instead would abrogate the enforcement of police powers by a State. No provision of the Bankruptcy Code should be construed in a fashion that would render it unconstitutional.

(c) Amendment X to the United States Constitution would be violated by any provision of the Bankruptcy Code or related laws if it were construed to prohibit the enforcement of police power-grounded state laws by State authorities or if State authorities were subjected to contempt proceedings before bankruptcy courts because of their performance of their duties involving the enforcement of police power-grounded State laws. Amendment X reserves to the State of Missouri all powers not delegated to Congress by the Constitution. When enacting the Bankruptcy Code and related amendments Congress did not have or purport to exercise a power that would confer on bankruptcy courts jurisdiction and power to abrogate State laws such as the Missouri Grain Laws, or to abrogate the rights of the State of Missouri under Amendment X to enforce such Laws.

(d) Petitioners are immune from suit in the Bankruptcy Court by virtue of the Eleventh Amendment of the Constitution. Nor are Petitioners required to submit to contempt proceedings in the Bankruptcy Court, which involve the likely imposition of sanctions by the Bankruptcy Judge, including possible imprisonment, in order to maintain enforcement proceedings under the State's statutes; they are not required to submit to these extrajurisdictional powers. Although it is doubtful that a bankruptcy court has the power to imprison for contempt under § 405(a)(1)(B) of Title IV of Public Law 95-598, Petitioner Runyon should not be required to test that question.

(e) The contempt proceedings threatened by Respondents against the Petitioners, despite issuance of the Missouri Circuit Court's Enforcement Order dated October 20, 1980, would effectively constitute a proceeding to enjoin that state court. That court's order directs Petitioner Runyon to seize this grain. The Bankruptcy Court's action would effectively enjoin the Missouri Circuit Court. However, a bankruptcy court has no jurisdiction during the transition period to entertain a proceeding to enjoin a court, by virtue of the express exclusion of such power by § 405(a)(1)(A) of Title IV of the Public Law 95-598.

(f) The Missouri Grain Laws constitute a proper exercise of the police power of the State because the grain warehouse business affects the public interest. It has been long established that a court of bankruptcy does not have power or subject matter jurisdiction to act in a field covered by State legislation enacted in the public interest, where enforcement has been entrusted by the legislature to state agencies; Congress never intended to give courts of bankruptcy or bankruptcy trustees the power to supersede or preempt such state authority. Bankruptcy courts are without power to enjoin enforcement of state law by state authorities acting to enforce their police and regulatory powers. The provisions of the 1978 Bankruptcy Code confirm such lack of power. Although § 362(a) of the Bankruptcy Code provides that the filing of a bankruptcy case automatically stays most proceedings against the debtor and the bankruptcy trustee, § 363(b)(4) and § 363(b)(5) of the Bankruptcy Code expressly provide that a governmental unit may commence or continue to "enforce such governmental unit's police and regulatory power". A "governmental unit", under Code § 101(21), includes a State as well as departments, agencies and instrumentalities of a State. The purpose of this legislation was to insure that States would be free, notwithstanding the bankruptcy of a debtor,

to enforce their laws. House Rep. 95-595, p. 343. Further, 28 U.S. § 1428, dealing with the removal of cases to bankruptcy courts from other courts, confirms that Congress never intended that bankruptcy courts have jurisdiction over, or the power to destroy, a State's action to enforce its police or regulatory power.

42. This petition is filed with this Court as contemplated by the order of the Court of Appeals dated October 21, 1980. (Exhibit B).

WHEREFORE, your Petitioners respectfully request:

1. That a writ of prohibition be issued against the Bankruptcy Court and Bankruptcy Judge prohibiting them from interfering with Petitioners' enforcement of the police and regulatory power of the State of Missouri and in particular that they be prohibited (a) from interfering with Petitioners' enforcement of the Missouri Grain Warehouse Law and the Missouri Grain Dealers Law to the extent herein described, (b) from interfering with steps by Petitioners to regain possession and control of the grain in the Missouri grain warehouses referred to herein, (c) from adjudicating any proceedings seeking to hold any of the Petitioners in contempt and (d) from adjudicating the ownership of the grain contained in such Missouri grain warehouses; and

2. That the Petitioners have such other and further relief as is just.

Dated at Jefferson City, Missouri, October 30, 1980

Respectfully submitted,

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